No. 92-402

Supreme Court, U.S.
FILED
SEP 3 1992
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

ROBERT NICHOLS, et al.,

Petitioners,

vs.

MICHAEL ROMBERG and DEBRA ROMBERG,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Of Counsel:
DEWITT CLINTON
COUNTY COUNSEL
ROBERT AMBROSE
ASSISTANT COUNTY
COUNSEL
PATRICK MEYERS
PRINCIPAL DEPUTY
COUNTY COUNSEL
648 Hall of Admin.
500 West Temple St.
Los Angeles, CA 90012
(213) 974-1900

RICHARD P. TOWNE, ESQ.*
KEITH A. FINK, ESQ.
Counsel for Petitioner
COTKIN & COLLINS
201 N. Figueroa Street
Suite 1100
Los Angeles, CA 90012
(213) 250-3600

*Counsel of Record

Lorraine Mitchell Legal Briefs

732 E. WASHINGTON BOULEVARD
LOS ANGELES, CALIFORNIA 90021-3088
(213) 747-5631 • FAX: (213) 747-5843

CONTENTS REPRODUCED FROM FURNISHED PRETYPED COPY.

QUESTION PRESENTED

Is a plaintiff who initially sought a large damage award, but who ultimately asks the jury for and recovers only one dollar as nominal damages for a technical violation of his constitutional rights, a "prevailing party" within the meaning of 42 U.S.C § 1988 and this Court's decisions in Hewitt v. Helms,[1/] Rhodes v. Stewart,[2/] and Texas State Teachers Assn. v. Garland,[3/] where the District Court found that the defendants acted in good faith and out of a "genuine human concern" for the plaintiff?

1/ 482 U.S. 744 (1987).

2/ 488 U.S. 1 (1988).

3/ 489 U.S. 782 (1989).

LIST OF PARTIES

The parties to the proceedings below were the petitioners, Robert Nichols, Dennis Lazzari, Hugh Lloyd, Johnny Jurtado, Thomas Laing, Diane Hannon and R.D. Campbell, and the Respondents Michael Romberg and Debra Romberg.

The parties before this Court are the same.

TABLE OF CONTENTS

PAGE(S)

QUESTION PRESENTED i

LIST OF PARTIES ii

OPINIONS BELOW 3

JURISDICTION 6

STATUTE INVOLVED 8

STATEMENT OF THE CASE 9

REASONS FOR GRANTING THE WRIT . . 18

I. The Issue of Whether a One Dollar Judgment in a Civil Rights Suit Entitles a Plaintiff to "Prevailing Party" Status Under 42 U.S.C. § 1988 is Currently Pending before this Court in a Case in Which Certiorari has been Granted 19

II. The Courts of Appeals are in Direct Conflict over the Question of Whether a Plaintiff who Receives a One Dollar Judgment in a Civil Rights Suit is a Prevailing Party for the Purposes of 42 U.S.C. § 1988 23

III. The Issue is of Fundamental Importance Because Allowing a Plaintiff Who Only Recovers Nominal Damages of One Dollar to Collect Attorneys' Fees Encourages a Conflict of Interest Between the Attorney and Client 33

A. The Ninth Circuit's Opinion Will Lead to Unjust Results and Invite Jury Deception 33

IV. This Court Should Review Romberg Because the Texas State Threshold is Not Met by an Award of Only One Dollar Against Law Enforcement Officers Who Acted in Good Faith and Out of A Genuine Concern for the Plaintiff's Safety 38

CONCLUSION 43

APPENDICES

A. Ninth Circuit Court of Appeals, July 7, 1992, Order and Amended Opinion A-1

B. Ninth Circuit Court of Appeals, January 13, 1992, Opinion B-87

C. August 17, 1992 Order of the District Court C-175

D. Ninth Circuit Court of Appeals, May 25, 1990 Order . . D-180

E. January 20, 1989, Order of the District Court Awarding $29,137.50 in Fees . . E-183

F. Ninth Circuit Court of Appeals, August 16, 1988, Memorandum Opinion F-191

G. November 30, 1987, District Court Order Awarding $5,000 in Fees G-194

TABLE OF AUTHORITIES

PAGE(S)

CASES:

Brooks v. Cook,
938 F.2d 1048
(9th Cir. 1991) 34, 35, 37

BSA, Inc. v. King County,
804 F.2d 1104, 1112
(9th Cir. 1986). 35, 36

Carr v. City of Florence,
729 F.Supp. 783
(N.D. Ala. 1990), aff'd
934 F.2d 1264 (11th Cir. 1991) 27

Denny v. Elliot,
937 F.2d 602 25

Denny v. Hinton,
131 F.R.D. 659
(M.D.N.C. 1990) 25

Domegan v. Ponte,
1992 WL 188811
(1st Cir. (Mass.)) 30

Farrar v. Cain,
941 F.2d 1311
(5th Cir. 1991)
Farrar v. Hobby,
---U.S. ---,
112 S. Ct. 1159,
117 L. Ed. 2d 407
(1992) (No. 91-990) 19-22, 25, 26
31, 33

Fassett by and through
Fassett v. Haeckel,
936 F.2d 118 (2d Cir. 1991) . . 29

Hewitt v. Helms,
482 U.S. 744 (1987) . . . . i, 39

Keney v. New York,
388 U.S. 440 (1967) 22

Langton v. Johnston,
928 F.2d 1206
(1st Cir. 1991) 30

Lawrence v. Hinton,
937 F.2d 603
(4th Cir. 1991) 25

Lewis v. Kendrick,
944 F.2d 949
(1st Cir. 1991) 30, 34

Marks v. United States,
430 U.S. 188 (1977) 23

McElroy v. United States,
455 U.S. 642 (1982) 23

Nadeau v. Helgemoe,
581 F.2d 275, 278-79
(1st Cir. 1978)) 39

Northbrook Excess
and Surplus Ins. v.
Proctor & Gamble,
924 F.2d 633 (7th Cir. 1991) . 26

Rhodes v. Stewart,
488 U.S. 1, 3-4 (1988) . . i, 39

Robinson v. Ariyoshi,
933 F.2d 781 (9th Cir. 1991) 35, 36

Romberg v. Nichols,
Nos. 90-56125, 91-55012
(9th Cir. July 7, 1992),
___ F.2d ___,
1992 WL 152118
(9th Cir. (Cal.) 3, 4, 13, 29, 33,
34, 35, 36, 37, 40

Ruggiero v. Krzeminski,
928 F.2d 558
(2d Cir. 1991) 29

Shapiro v. United States,
335 U.S. 1 (1948) 24

Texas State Teachers Assn.
v. Garland,
489 U.S. 782 (1989) i, 15, 16, 18
27, 36, 38, 41

Walker v. Anderson Electrical
Connectors,
944 F.2d 841
(11th Cir. 1991) 27

Warren v. Fanning,
950 F.2d 1370
(8th Cir. 1991) 26

STATUTES:

28 U.S.C. § 1254(1) 7

42 U.S.C.
§ 1983 . . . . . 6, 8, 12, 34, 42
§ 1988 . . i, 16, 19, 20, 21, 23, 24, 25, 27, 28, 29, 30, 31, 38
§ 1988(b) 8
§ 1981 8
§ 1981a 8
§ 1982 8
§ 1985 8
§ 1986 8

Title IX of Public Law 92-318 . . . 8

Title VI of the
Civil Rights Act
of 1964 8

Title VII of the
Civil Rights Act of 1964 . . . 27

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

ROBERT NICHOLS, et al.,

Petitioners,

vs.

MICHAEL ROMBERG and DEBRA ROMBERG,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, Robert Nichols, Dennis Lazzari, Hugh Lloyd, Johnny Jurtado, Thomas Laing, Diane Hannon and R.D. Campbell, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the

Ninth Circuit, entered in the above-titled proceeding on July 7, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit in this case is not yet available in the official reporter. A copy of the slip opinion, Romberg v. Nichols, Nos. 90-56125, 91-55012 (9th Cir. July 7, 1992), ___ F.2d ___, 1992 WL 152118 (9th Cir. (Cal.)), is reprinted in Appendix A, *infra*. This opinion was published pursuant to an order of the Ninth Circuit dated July 7, 1992, amending and superseding the Court's opinion in Romberg v. Nichols, 953 F.2d 1152 (9th Cir. 1992), which is reprinted in Appendix B, *infra*.

The Order of the United States District Court for the Central District of California (Gadbois, D.J.) dated August 17, 1991, from which the

above-appeal was taken, was not reported. It is reprinted in Appendix C, *infra*.

The Order of the Court of Appeals for the Ninth Circuit dated May 25, 1990, in which the Court vacated a prior District Court Order regarding fees, was not published and has been reprinted in Appendix D, *infra*.

The Order of the United States District Court for the Central District of California (Gadbois, D.J.) dated January 20, 1989, in which the Court determined the fee award in this case in light of the August 16, 1988 memorandum from the Ninth Circuit Court of Appeals, has not been published. Romberg v. Nichols, 855 F.2d 862 (Table). It is reprinted in Appendix E, *infra*.

The memorandum of the Court of Appeals for the Ninth Circuit dated August 16, 1988, in which the Court vacated the original fee award by the District Court, has not been reported. It is reprinted in Appendix F, *infra*.

The Order of the United States District Court for the Central District of California (Gadbois, D.J.) dated November 30, 1987, in which the Court made the initial fee award in this case, has not been reported. It is reprinted in Appendix G, *infra*.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 1983, the Respondents brought this suit in the Central District of California on December 23, 1983. A jury returned a verdict in favor of Respondents with a nominal award of one dollar each. The District Court thereafter granted Respondents' motion for attorney's fees. Pp. G-194-195, *infra*.

Following numerous appeals regarding the propriety and amount of the attorney's fee award, on January 13, 1992, the Ninth Circuit affirmed the propriety and amount of the attorney's fee award. Pp. B-87-174, *infra*.

A Petition for Rehearing was timely filed by Petitioners. In an

order dated July 7, 1992, the Ninth Circuit amended the January 13, 1992 opinion and denied the Petition for Rehearing. Pp. A-1-86, *infra*.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1988(b). Attorney's Fees.

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this Title, Title IX of Public Law 92-318, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

The Petitioners are all Los Angeles County Sheriff's Deputies. Late in the evening of May 23, 1982, two of the Petitioners, while on vehicle patrol, received a radio transmission reporting a domestic disturbance at Respondents' address. They responded immediately.

When they arrived, they heard loud voices, yelling and a crash. The deputies found approximately ten people gathered below and pointing to Respondents' apartment. As they ascended the stairway leading to Respondents' apartment to investigate, the deputies heard a woman crying, a loud male voice and some type of pounding. The deputies also noted an odor they believed to be ether, a

substance they knew to be associated with narcotics.

After reaching Respondents' apartment, the deputies observed through the screen door a young lady on the floor with a man standing beside her. He was yelling and shaking his fist at her and she was pounding an object on the floor.

The pair's bizarre behavior, coupled with the scent of ether, indicated to the deputies that the couple might be under the influence of drugs, specifically phencyclidine (PCP). Concerned for the woman's safety as well as their own, the deputies requested back-up units before proceeding further. Two other deputies, also Petitioners in this action, arrived, and before the first

deputies could explain what had transpired, a loud crash and a scream emanated from the direction of Respondents' apartment. Fearing that the woman had been seriously injured, the deputies ran back up the stairs. When they could not see the woman, they entered the apartment.

Respondent Michael Romberg immediately resisted, instigating an altercation with two of the deputies. Two other deputies proceeded to search the apartment for the woman whom they heard scream. They found her in bed, and brought her out into the living room. The deputies determined that the woman, Respondent Debra Romberg, was not harmed.

At this point, another deputy observed drug paraphernalia in the

living room and conducted a brief visual search of the apartment for any further evidence of drugs.

Invoking federal jurisdiction under 42 U.S.C. § 1983, the Respondents brought this suit in the Central District of California on December 23, 1983. The suit initially alleged that seven deputies, as well as the County of Los Angeles, violated Respondents' Fourth Amendment rights by not obtaining a search warrant before entering Respondents' apartment. The suit also alleged excessive force, conspiracy, malicious prosecution and false arrest. Respondents sought $2 million in general and punitive damages, plus costs and fees.

The District Court dismissed the County of Los Angeles, as well as one

of the deputies as defendants. The district court also dismissed all of Respondents' claims, except the alleged Fourth Amendment violation.

After a four-day trial, a jury returned a verdict in favor of Respondents with a nominal award of one dollar each. This was apparently in response to Respondents' attorney's statement, in his summation, that, in his view, his clients were only entitled to damages "in some sum like one dollar." See Romberg v. Nichols, 953 F.2d 1152, 1155 (9th Cir. 1992). Pp. A-15-16; B-103, *infra*.

The District Court thereafter granted Respondents' motion for attorney's fees, but in an amount radically less than that requested by

Respondents.[4] Pp. G-194-195, *infra*.

Respondents appealed, contending that the fee award was insufficient. On August 16, 1988, the Ninth Circuit found that it was unable to review the District Court's Order regarding attorney's fees as written, and vacated and remanded with instructions for the District Court to issue a more detailed Order. Pp. F-191-193, *infra*.

On remand, on January 20, 1989, the District Court issued a four page Order awarding Respondents an attorney's fee in the amount of $29,137.50. Pp. E-183-190, *infra*. The District Court realized that had Respondents' attorney not made a last

---

[4] $5,000 was awarded. $45,000 was requested by Respondents.

second plea for one dollar, the jury would likely have returned a defense verdict. Pp. E-185, *infra*.

Thereafter, Petitioners appealed, contending that in light of the intervening United States Supreme Court decision in Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782 (1989), Respondents were not entitled to any fees. The Respondents cross-appealed, insisting that the fee award was still too low.

On May 25, 1990, the Ninth Circuit again vacated the District Court's Order, and remanded for a specific determination of whether Texas State Teachers precluded recovery of fees. The Ninth Circuit did

not address the Respondents' cross-appeal. Pp. D-180-182, *infra*.

On remand, on August 17, 1990, the District Court found that Texas State Teachers did not preclude Respondents from recovering attorney's fees. Pp. C-175-179, *infra*. Petitioners appealed this determination, and Respondents cross-appealed once again claiming that the amount of the attorney's fee award was too low.

On January 13, 1992, the Ninth Circuit issued an opinion in which the Court held: (1) Respondents were indeed prevailing parties in this action, and thus are entitled to attorney's fees under 42 U.S.C. § 1988 and Texas State Teachers; (2) the amount of the district court's award

of fees was not an abuse of discretion; and (3) Respondents should also receive compensation for work done in the many appeals in the action, as well as for the delay in receiving the initial award, in an amount to be determined by the district court. Pp. B-87-174, *infra*.

Petitioners filed a timely petition for rehearing with the Ninth Circuit. In an order dated July 7, 1992, the Ninth Circuit denied the petition for rehearing, and filed an amended opinion, superseding the January 13, 1992 opinion. Pp. A-1-86, *infra*.

REASONS FOR GRANTING THE WRIT

This Court should review the holding of the Ninth Circuit awarding attorneys' fees in favor of plaintiffs who received a jury verdict of one dollar ($1.00) against six law enforcement officers found to be acting in good faith for two reasons. First, the decision below is directly at odds with Texas State Teachers, supra, which requires a material alteration of the legal relationship between the parties to warrant a fee award. Second, the decision below is inconsistent with holdings of the Circuit Courts of Appeals for the Fourth, Fifth, Seventh, Eighth and Eleventh Circuits, as well as prior Ninth Circuit holdings.

The issue presented is of paramount concern to law enforcement agencies and government entities as well as other civil rights litigants and is worthy of review by this Court.

I.

The Issue of Whether a One Dollar Judgment in a Civil Rights Suit Entitles a Plaintiff to "Prevailing Party" Status Under 42 U.S.C. § 1988 is Currently Pending before this Court in a Case in Which Certiorari has been Granted

On February 24, 1992, this Court granted a writ of certiorari in the case of Farrar v. Cain, 941 F.2d 1311 (5th Cir. 1991) cert. granted sub nom. Farrar v. Hobby, --- U.S. ---, 112 S. Ct. 1159, 117 L. Ed. 2d 407 (1992)

(No. 91-990).[5/] In Farrar, the Fifth Circuit held that a one dollar nominal judgment for a civil rights violation did not entitle the plaintiffs in the case to "prevailing party" status within the meaning of 42 U.S.C. § 1988.

By granting the writ of certiorari in Farrar, this Court recognized the importance of the issue of entitlement to "prevailing party" status within the meaning of 42 U.S.C. § 1988. This Court also recognized the difficulty the various Circuit Courts of Appeals have had in determining whether a party is a "prevailing party," a difficulty which has led to conflicting results in

---

[5/] This case is currently set for argument on October 7, 1992.

nearly identical cases.

The question presented to this Court by the present case is similar but not identical to the question presented by Farrar: Is a party who recovers a nominal award of one dollar in a civil rights suit a "prevailing party" within the meaning of 42 U.S.C. § 1988 where the District Court found that the "non-prevailing parties" acted in good faith and out of a "genuine human concern" for the plaintiff. Pp. E-185, *infra*. The fact that certiorari was granted in Farrar shows that the broad question of "prevailing party" status in civil rights litigation is an important one which has not yet been answered conclusively.

This writ for certiorari should

be granted to consider the important ramifications of the prevailing party status issue presented by this petition. If, however, this Court should deem that the writ should not be granted at the present time, the Court should hold the petition for the writ until it decides the similar issue presented by Farrar. The Court took similar action in Keney v. New York, 388 U.S. 440 (1967), where a petition for a writ of certiorari was held until decisions were rendered in similar cases.

II.

The Courts of Appeals are in Direct Conflict over the Question of Whether a Plaintiff who Receives a One Dollar Judgment in a Civil Rights Suit is a Prevailing Party for the Purposes of 42 U.S.C. § 1988.

Generally speaking, a grant of certiorari is proper where federal courts of appeal are in square and irreconcilable conflict over an issue. See, e.g., McElroy v. United States, 455 U.S. 642, 643 (1982) (certiorari granted on an issue because of "a conflict among the Circuits on this issue of statutory construction"); Marks v. United States, 430 U.S. 188, 189 (1977) (certiorari granted "to resolve a conflict in the Circuits"). This is particularly true where the

question raised is an important and recurring one. See, e.g., Shapiro v. United States, 335 U.S. 1,4 (1948) (certiorari granted "because this conflict involves an important question of statutory construction").

The question of whether a civil rights plaintiff who receives a nominal damage award is a prevailing party under 42 U.S.C. § 1988 and thus entitled to recover attorney's fees is an important and recurring one over which the Circuits are irreconcilably divided.

On the one hand, the Fourth, Fifth, Seventh, Eighth and Eleventh Circuit Courts of Appeals are in agreement that a verdict of one dollar, or some other nominal relief, does not confer upon the plaintiff

"prevailing party" status within the meaning of 42 U.S.C. § 1988, and thus does not entitle the plaintiff to recover attorney's fees.

The Fourth Circuit, in Denny v. Hinton, 131 F.R.D. 659 (M.D.N.C. 1990), aff'd mem., Denny v. Elliot, 937 F.2d 602, and Lawrence v. Hinton, 937 F.2d 603 (4th Cir. 1991), has held that a jury verdict in favor of the plaintiff for one dollar was *de minimis* and thus did not confer "prevailing party" status on the plaintiff.

The Fifth Circuit has held that a plaintiff who obtains a one dollar verdict is not a prevailing party and thus cannot recovery attorney's fees. Farrar v. Cain, 941 F.2d 1311, 1315-1317 (5th Cir. 1991), cert. granted

sub nom. Farrar v. Hobby, ___ U.S. ___, 112 S. Ct. 1159, 117 L. Ed. 2d 407 (1992).

The Seventh Circuit, in Northbrook Excess and Surplus Ins. v. Proctor & Gamble, 924 F.2d 633, 641-2 n.11 (7th Cir. 1991), has held that a recovery of $45,500, in light of a claim of more than $5 million, was *de minimis* and thus did not confer prevailing party status on the plaintiff.

The Eighth Circuit has also refused to grant prevailing party status to plaintiffs who obtain only nominal judgments. Warren v. Fanning, 950 F.2d 1370, 1375 (8th Cir. 1991) petition for cert. filed March 27, 1992 (No. 91-8221) (jury verdict finding that plaintiff's Eighth

Amendment rights were violated was "pyrrhic victory" and thus *de minimis* under Texas State Teachers. Therefore, plaintiff was not prevailing party).

The Eleventh Circuit, in Walker v. Anderson Electrical Connectors, 944 F.2d 841, 847 (11th Cir. 1991), petition for cert. filed May 8, 1992 (No. 91-1794), has held that the mere fact that the jury found that the defendant committed acts of sexual harassment and thus violated Title VII did not entitle plaintiff to attorneys' fees as a prevailing party under 42 U.S.C. § 1988. Similarly, in Carr v. City of Florence, 729 F.Supp. 783, 791 (N.D. Ala. 1990), aff'd 934 F.2d 1264 (11th Cir. 1991), the District Court denied an award of attorney's fees to a

plaintiff even though a jury found that police officers violated a citizen's rights by slapping him and awarded plaintiff $100 in compensatory damages. The Court reached this result because the judgment was still technical and *de minimis*.

However, despite these cases, the Second and the Ninth Circuits, and perhaps also the First Circuit, in which there are several inconsistent decisions, have held that even a one dollar nominal judgment entitles a plaintiff to recover attorney's fees as a prevailing party under 42 U.S.C. § 1988.

The Second Circuit has held that even a one dollar award entitles a plaintiff to attorney's fees as the prevailing party under 42 U.S.C.

§ 1988. Fassett by and through Fassett v. Haeckel, 936 F.2d 118, 122 (2d Cir. 1991) (fee award appropriate where nominal damages are recovered for violation of constitutional right); accord, Ruggiero v. Krzeminski, 928 F.2d 558, 564 (2d Cir. 1991).

The Ninth Circuit, in the present case of Romberg v. Nichols, Nos. 90-56125, 91-55012 (9th Cir. July 7, 1992), 1992 WL 152118 (9th Cir. (Cal.)), has held, in no uncertain terms, that even a one dollar judgment entitle the plaintiff to recover attorney's fees as a "prevailing party." The Court reached this result despite the fact that the plaintiff had sought damages in the amount of $2 million.

The most recent case on this issue emanating from the First Circuit also holds that an award of one dollar entitles a plaintiff to recover attorney's fees as a "prevailing party" under 42 U.S.C. § 1988. Domegan v. Ponte, 1992 WL 188811 (1st Cir. (Mass.)). But see, Lewis v. Kendrick, 944 F.2d 949 (1st Cir. 1991) (thousand dollar jury award for Fourth Amendment violation was technical and *de minimis*, and plaintiff's counsel acted improperly in requesting fees); and Langton v. Johnston, 928 F.2d 1206, 1226 (1st Cir. 1991) (if issue of "double bunking" was of only "minor significance," or did not have a "catalytic effect" in bringing about abandonment of the practice, no fees may be awarded under 42 U.S.C.

§ 1988).

Based on the foregoing, it is clear that there is a serious conflict between the Circuits over whether a plaintiff who receives a one dollar judgment in a civil rights suit is a "prevailing party" for the purpose of recovering attorney's fees under 42 U.S.C. § 1988.

On this basis, Petitioners request that the Court should grant the writ of certiorari in this case, or at least hold this petition until the Court has decided Farrar v. Cain, 941 F.2d 1311 (5th Cir. 1991) cert. granted sub nom. Farrar v. Hobby, --- U.S. ---, 112 S. Ct. 1159, 117 L. Ed. 2d 407 (1992) (No. 91-990), a case which addresses the substantially similar

issue, in order to clarify the serious conflict between the Circuits.

III.

The Issue is of Fundamental Importance Because Allowing a Plaintiff Who Only Recovers Nominal Damages of One Dollar to Collect Attorneys' Fees Encourages a Conflict of Interest Between the Attorney and Client[6/]

A. The Ninth Circuit's Opinion Will Lead to Unjust Results and Invite Jury Deception

If the Ninth Circuit's Opinion in this case is allowed to stand, civil rights plaintiffs' counsel will be encouraged to argue to the jury in non-meritorious or losing cases that, as in Romberg, supra:

"[Plaintiffs] in this case

[6/] This issue was extensively briefed by the County of Los Angeles as amicus curiae in support of Respondent Hobby in Farrar v. Hobby, No. 91-990.

> don't want any money. They want you to vindicate their rights. If you find their rights were violated, you can award what's called nominal damages in some sum like one dollar. And I think that's all they're entitled to in this case, is nominal damages." Pp. A-42, *infra*.

Romberg is typical of a growing trend of cases brought under 42 U.S.C. § 1983 involving alleged civil rights violations where plaintiffs seek millions of dollars in money damages in actions which end in verdicts of nominal damages only.[7]

A recent example of this result, where the plaintiff's counsel made an eleventh hour plea for nominal damages, is found in Brooks v. Cook,

---

[7] See, e.g., Lewis v. Kendrick, 944 F.2d 949 (1st Cir. 1991) (Jury award for Fourth Amendment violation was technical and *de minimis* where plaintiff sought $300,000 and received jury verdict for $1,000).

938 F.2d 1048, 1050 (9th Cir. 1991). Although the plaintiff's complaint sought $2,000,000, by the time of trial, his trial counsel, recognizing, based on the evidence, that he would not otherwise prevail, reduced his request in summation to "a nominal verdict of one dollar" so that he would be eligible for attorneys' fees.

The Romberg and Brooks decisions of the Ninth Circuit appear to compel attorneys' fees awards in cases where only nominal damages are recovered.[8/]

[8/] The Ninth Circuit's position on entitlement to fees is not uniform or consistent, as is evidenced by its decisions in Robinson v. Ariyoshi, 933 F.2d 781 (9th Cir. 1991); and BSA, Inc. v. King County, 804 F.2d 1104, 1112 (9th Cir. 1986). In Robinson v. Ariyoshi, 933 F.2d 781 (9th Cir. 1991), the Court noted that "[t]he statutory fee for those who prevail in civil rights litigation is not authorized by general considerations of equity. To win fees, plaintiffs must prevail in some significant way." Id. at 786 (emphasis added). The Court further held that "[t]his court may not grant attorney's fees on

In reviewing the decision of the Ninth Circuit, this Court could clarify that District Courts have the discretion to prevent the inequity of granting such large fee awards to . . . a civil rights attorney who recognizes that [his] own case is not especially strong [and] drastically reduces [his] initial claims and asks the jury for nominal damages." Pp. A-46, *infra*.

As District Judge Williams stated

---

the ground that the requesting party has obtained a favorable judicial statement of the law." Id. at 788."

Similarly, in BSA, a pre-Texas State Teachers opinion, the Ninth Circuit held:

> "Here, BSA sought a permanent injunction against enforcement of the entire King County ordinance. The district court did enjoin enforcement of two of the ordinances sections. However, it upheld the major provisions against BSA's attack. Given BSA's limited success, [the district court's finding denying attorney's fees under 42 U.S.C. 1988] was not clearly erroneous.

BSA, Inc. v. King County, 804 F.2d 1104, 1112 (9th Cir. 1986). King County is, therefore, consistent with Texas State Teachers and Ariyoshi, and inconsistent with Romberg.

in the Brooks trial record to the plaintiff's counsel:

> "Well, what you're asking me to do then is to let you, uh, pull a sneaker on the jury, and get away with it . . . So you could then come in [sic] say I'm the prevailing party, so give me attorneys' fees. . . .
>
> I'm not going to let the jury go into that deliberation room with, uh, that--I don't want to use the word fraud but I'll use it--pulled upon them. My job is to instruct the jury, not to deceive them."

Brooks, supra, 938 F.2d at 1050.[9/]

This Court can discourage any future "sneakers" by reviewing the decision in Romberg.

[9/] In a situation such as this, where attorney's fees may be awarded following a $1.00 damage award, the plea for nominal damages represents more than just a plea for vindication - - it is a request that the jury unknowingly give plaintiff's counsel the right to subsequently seek, outside of their presence, an amount of money potentially tens of thousands of times the amount of the nominal damage award.

IV

This Court Should Review Romberg Because the Texas State Threshold is Not Met by an Award of Only One Dollar Against Law Enforcement Officers Who Acted in Good Faith and Out of A Genuine Concern for the Plaintiff's Safety

In Texas State Teachers, this Court unanimously adopted the First Circuit's test for identifying whether a civil rights plaintiff is a prevailing party within the meaning of § 1988: "If the plaintiff has succeeded on 'any significant issue in litigation which achieve[d] some of the benefits the parties sought in bringing suit' the plaintiff has crossed the threshold to a fee award

of some kind."[10] To satisfy this inquiry, "the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant."[11] Whether a material alteration of that legal relationship has occurred is the "touchstone" of the necessary inquiry.[12] Accordingly, this Court should consider whether the Rombergs' recovery of one dollar in nominal damages constitutes a "material alteration" of both plaintiffs' "legal relationship" with

---

[10] 489 U.S. 782, 791-92 (1989) (quoting Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978)).

[11] Id. at 792 (citing Hewitt v. Helms, 482 U.S. 755, 762, 9 L.Ed.2d 654, 102 S.Ct. 2672 (1987), and Rhodes v. Stewart, 488 U.S. 1, 3-4, 102 L.Ed.2d 1, 109 S.Ct. 202 (1988)).

[12] Id. at 792-93.

the six deputies. Because Romberg does not articulate how the legal relationship between the Rombergs and Petitioners has been materially altered by the outcome of the litigation, the Romberg decision simply assumes a priori that the verdict in favor of the Rombergs met this test.

In Part II of the Romberg opinion, the majority seems to say that an alteration of the legal relationship occurred by the mere fact that "six Los Angeles police officers acting under color of law were found liable of depriving the Rombergs of their Fourth Amendment rights" ". . . and [therefore] the jury's affirmative determination that the defendants violated the Rombergs' important civil

rights is enough to render the Rombergs' eligible for an award of fees." Pp. A-29, A-36, *infra*.

On the one hand, the Ninth Circuit has apparently ruled that there can never be a *de minimis* victory as defined by the Supreme Court in Texas State Teachers in cases involving violations of the Fourth Amendment, since a lesser victory than that obtained by the Rombergs is virtually impossible. In Part III of the Opinion, however, the Court notes: "The 'vindication' obtained by the Rombergs also does not appear to have resulted in any highly significant benefit to the Rombergs or society in general." Pp. A-59, *infra*.

If no benefit inured either to the Rombergs nor to society at large,

how can there be a material alteration in the legal relationship between the parties? The jury's award of one dollar did not force the municipal entity[13/] to take any steps after this incident in terms of advising its deputies how to effectuate searches and seizures. The jury's determination in no way has a deterrent effect on the conduct of any of these deputies in the future since these deputies were acting out of concern for Romberg's welfare. Indeed, the only real source of deterrence emanates from the award of fees itself.

Most of § 1983 cases involve claim against law enforcement officers

---

13/ The County of Los Angeles.

and agencies of financially strapped municipalities. This Court can and should now consider whether in cases where triers of fact find only nominal damages appropriate it is unfair to burden defendants who acted in good faith with any fee award.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request that their petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD P. TOWNE, ESQ.*
KEITH A. FINK, ESQ.
Counsel for Petitioner
201 N. Figueroa Street
Suite 1100
Los Angeles, CA 90012
(213) 250-3600
*Counsel of Record

August 28, 1992

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL ROMBERG; DEBRA ROMBERG, Plaintiff-Appellees-Cross-Appellants, v. ROBERT NICHOLS; DENNIS LAZZARI; HUGH LLOYD; JOHNNY JURTADO; THOMAS LAING; DIANE HANNON; R.D. CAMPBELL, Defendants-Appellants-Cross-Appellees.	Nos. 90-56125 91-55012 D.C. No. CV 83-8448-RG ORDER AND AMENDED OPINION

Appeal from the United States District Court for the Central District of California Richard A. Gadbois, Jr. District Judge, Presiding

Argued and Submitted
May 14, 1991--San Francisco, California

Filed January 13, 1992
Amended July 7, 1992

Before: J. Clifford Wallace, Chief Judge
David R. Thompson and Diarmuid F. O'Scannlain, Circuit Judges.

Per Curiam; Concurrence by Chief Judge Wallance; Dissent by Judge O'Scannlain

SUMMARY

Conflict of Laws/Civil Rights

Affirming a district court judgment, the court of appeals held that a jury verdict awarding appellants nominal damages of $1 each for the violation of their civil rights by Los Angeles police officers entitled them to attorneys' fees under Section 1988 as "prevailing parties."

Appellants Michael and Debra Romberg filed suit against various Los Angeles police officers for the violation of their fourth amendment rights when the officers entered their apartment and searched it without a search warrant. A jury returned a verdict for the Rombergs with a nominal award of $1 each. The

district court denied the defendants' alternative motions of jnov and new trial, and granted the Rombergs' motion for attorneys' fees under Sec. 1988. However, the district court lowered the amount of the fee award. The Rombergs appealed, claiming that the district court's fee award was unjustifiably low. Appellees cross-appealed, arguing that the Rombergs were not entitled to any fees at all because their victory was too insignificant to consider them "a prevailing party" for purposes of Sec. 1988.

[1] Applying the Supreme Court's decision in *Texas State Teachers Association v. Garland Independent School District*, the court held that the Rombergs were indeed "a prevailing

party" within the meaning of Sec. 1988 because the nature of their success in the underlying action was neither purely technical nor minimal. [2] The fact that the jury awarded the Rombergs only $1 each in damages did not vitiate the fact that the defendants were found liable on the merits of violating their civil rights. Despite the amount of the award, the Rombergs still prevailed on a significant legal issue, and that alone was significant. [3] The Supreme Court's "issue-relief" distinction in *Texas State Teachers* highlighted a fundamental difference between civil rights litigation and general civil litigation. [4] The dispositive inquiry for Sec. 1988 purposes focuses upon the legal issues

at stake, not upon the prayer for relief. Thus, the jury's affirmative determination that the police officers violated the Rombergs' important civil rights was enough to render the Rombergs eligible for an award of fees.

[5] The court also held that under *Kerr*, the district court did not abuse its discretion in its calculation of the fee award up to the fee award order. [6] However, the court remanded for calculation of an appropriate fee award for subsequent proceedings, as well as appropriate compensation for delay.

Chief Judge Wallace concurred in the majority opinion but only with the result that the Rombergs were prevailing parties entitled to a fee

award under Sec. 1988. He wrote separately on this issue because he did not fully agree with the majority's reasoning, believing that its emphasis on the "issue-relief" distinction was misleading.

Judge O'Scannlain dissented in part, stating that the reasons cited by the district court for a reduction of the fee award were insufficient to justify departure from the presumptively reasonable lodestar figure.

COUNSEL

Stephen Yagman, Yagman and Yagman, Venice, California, for the plaintiffs-appellants.

Keith A. Fink, Cotkin, Collins & Franscell, Los Angeles, California, for the defendants-appellees.

ORDER

The opinion filed January 13, 1992 and amended February 20, 1992, is further amended as follows:

At slip op. 1658, line 4, amend the first sentence of the first full paragraph to read:

> The plaintiffs appealed, contending that this reduced fee award was insufficient, and a panel of this court, finding that it was "unable to review the order" as written, vacated and remanded with instructions for the district court to issue a more detailed order.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

With the above amendment, the petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

OPINION

PER CURIAM:

A jury awarded the Rombergs nominal damages of one dollar each in their civil rights action against six Los Angeles police officers. The question before us now is whether that victory is too insignificant to deem the Rombergs a "prevailing party" for purposes of recovering attorney fees under 42 U.S.C. § 1988, in light of

the Supreme Court's intervening decision in *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782 (1989).[1/]

[1/] This appeal presents what is largely a question of first impression in this circuit. Only five prior decisions by this court have addressed *Texas State Teachers*. *See Sanchez v. City of Santa Ana*, 936 F.2d 1027 (9th Cir. 1991); *Robinson v. Ariyoshi*, 933 F.2d 781 (9th Cir. 1991); *Duran v. City of Douglas*, 904 F.2d 1372 (9th Cir. 1990); *Lear Siegler, Inc. v. Lehman*, 893 F.2d 205 (9th Cir. 1990); *Herrington v. County of Sonoma*, 883 F.2d 739 (9th Cir. 1989). None of these cases addressed the Supreme Court's decision in any detail, and only three concerned those portions of the Court's holding that are relevant to this appeal. *See Sanchez*, 936 F.2d at 1041 (summarily ruling that denial of attorney fees to victorious plaintiff was abuse of discretion under *Texas State Teachers*); *Robinson*, 933 F.2d at 784-85 (finding no entitlement to fees under *Texas State Teachers* where subsequent decision had vacated previous favorable judgment on ripeness grounds); *Lear Siegler* 893 F.2d at 208 (finding no entitlement to fees under *Texas State Teachers* where plaintiff was "granted no relief in its underlying. . . claim and [where] its efforts resulted in no change in [the defendant's] procedures"); *see also Duran*, 904 F.2d 1379 (citing *Texas State Teachers* for proposition that attorney fees may be awarded pendente lite); *Herrington*, 883 F.2d at 742 (same). A number of district courts within this circuit have considered *Texas State Teachers* more thoroughly. *See, e.g., Achaval-Bianco v. Gustafson*, 736 F.Supp, 214, 215 (C.D. Cal. 1989) (finding entitlement to fees under *Texas State*

We conclude that it is not. We therefore affirm the district court's judgment to award fees. We also affirm the district court's determination of the amount of fees to be awarded for services through the date of the fee order. We remand, however, for calculation of fees due for subsequent proceedings.

I

A

On a May evening in 1982, two Los Angeles police officers responded to a call indicating a domestic disturbance

---

Teachers where plaintiffs have received some benefit on some claims before settlement of litigation). Even these decisions, however, provide little guidance on how to apply *Texas State Teachers*.

at the Rombergs' address.[2/] When the officers arrived at the address, they found approximately ten people gathered in front of the building and pointing toward the Rombergs' apartment. They also heard loud voices and pounding noises, and they entered they building to investigate. As they ascended the stairway leading to the Rombergs' apartment, the officers heard a woman crying, a loud male voice, and once again, "some type of pounding." They also sensed an odor in the stairwell and hallway that resembled ether, a substance that they understood is often associated with narcotics.

[2/] The Rombergs were not married at the time these events took place. Nonetheless, we refer to them as "the Rombergs" and as "Mr. and Mrs. Romberg" for convenience.

After reaching the Rombergs' apartment, the two officers observed through a screen door a young woman seated on the floor with a man standing alongside her. The man, later identified as Michael Romberg, was allegedly yelling and shaking his fist at the woman. The woman, later identified as Debra Romberg, was only partially clad and was beating an object on the floor. The pair's behavior, coupled with the scent of ether, allegedly suggested to the officers that the Rombergs might be under the influence of drugs, specifically phencyclidine (or "PCP").

Out of concern for the woman's safety as well as for their own, the officers retreated and requested back-up units before proceeding further.

Three units soon arrived, and before the first officers could fully explain what was happening, a loud crash and scream emanated from the Rombergs' apartment. Allegedly fearing that the woman had been seriously injured, the officers ran back up the stairs. When they could not see the woman, they decided to enter the apartment.

Mr. Romberg immediately resisted, telling the officers that they had no right to enter his home and poking one of the officers in the chest as the officer advanced in search of the woman. Two officers thereupon arrested and handcuffed Mr. Romberg for interfering with their search and for disturbing the peace. A male and female officer then located Mrs. Romberg in her bed, clothed her, and

brought her out into the living room. At this point, another police officer observed on a coffee table what he identified as narcotics paraphernalia: a cocaine pipe, a small amber vial, and a beaker. After determining that Mrs. Romberg was not harmed, the officers then undertook to search the Rombergs' apartment for any further evidence of drugs. As it turned out, the Rombergs' apartment had not been the source of the suspicious odor.

B

On December 23, 1983, the Rombergs filed suit, alleging that the police had violated their constitutional rights by not obtaining a search warrant before entering their home. They also alleged excessive force, conspiracy, malicious

prosecution, and false arrest claims. The Rombergs named seven police officers and the County of Los Angeles as defendants and prayed for $2 million in general and punitive damages, plus costs and fees. The district court dismissed the County, one police officer, and most of the Rombergs' claims before trial, but it declined to dismiss the Fourth Amendment claim against the remaining defendants. In fact, the court denied consecutive motions to that effect at the pleading stage, the summary judgment stage, and the directed verdict stage.

After a four-day trial, the jury returned a verdict for the Rombergs with a nominal award of one dollar each. The amount of the award

apparently followed the invitation of the Rombergs' attorney, who in his summation "[had] not ask[ed] for money, other than a perfunctory request for punitive damages." *Romberg v. Nichols*, No. 83-8448 at 1 (C.D. Cal. Jan. 20, 1989). Indeed, the Rombergs' attorney specifically informed the jury that, in his view, his clients were only entitled to damages "'in some sum like one dollar.'" *Id.* at 2 (quoting trial transcript).

The district court then denied the defendants' alternative motions for j.n.o.v. and new trial and granted the Rombergs' motion for attorney fees. *Romberg v. Nichols*, No. 83-8448 (C.D. Cal. Nov. 30, 1987). The court, however, lowered the amount of the fee

award from $45,000, the amount which the Rombergs had requested, to only $5,000. To account for this reduction, the Court explained:

> The court has some reason to question whether all the time claimed by counsel was warranted, but careful analysis of that is unnecessary. Suffice it to say: (i) the result achieved was fairly modest in tangible terms, (ii) it did not require exceptional legal talent to do it -- (no reflection on counsel's well-documented expertise), [and] (iii) the award is just and reasonable in light of the claims put forth and the brevity of the trial.

Id. at 1.

The plaintiffs appealed, contending that this reduced fee award was insufficient, and a panel of this court, finding that it was "unable to review the order" as written, vacated and remanded with instructions for the

district court to issue a more detailed order. *Romberg v. Nichols*, No. 87-6724 at 1 (9th Cir. Aug. 16, 1988). The court of appeals explained that effective review was not possible because the district court had not (a) set a lodestar figure and (b) specified the reasons for its reduction pursuant to an analysis of the twelve factors identified in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976).

On remand, the district court issued a four-page order awarding the Rombergs attorney fees in the amount of $29,137.50.[3] *Romberg v. Nichols*,

---

[3] Nichols argues that the remand order did not permit the district court to increase its fee award to this extent. This argument is without merit. The order left the district

No. 83-8448 (C.D. Cal. Jan. 20, 1989). The court initially set a lodestar figure of $48,562.50, which represented all the hours claimed by the Rombergs' attorney (277.5) compensated at the rate of $175 per hour. The court then discounted this figure by forty percent pursuant to its evaluation of the *Kerr* factors.

Once again the defendants appealed, contending that in light of the Supreme Court's intervening decision in *Texas State Teachers*, the Rombergs are not entitled to any fees at all. The Rombergs, meanwhile, cross-appealed, insisting that the district court's fee award was still unjustifiably low. On May 25, 1990,

---

court free to adjust the award as it saw fit upon consideration of the relevant factors.

this court again vacated the district court's order and remanded for a specific determination of whether *Texas State Teachers* does in fact indicate that the Rombergs are not entitled to recover any fees. *Romberg v. Nichols*, Nos. 89-55202 & 89-55218 (9th Cir. May 25, 1990). In so doing, we did not reach the issues raised in the Rombergs' cross-appeal, but we indicated that any future appeals would be handled on an expedited basis. *See id.* at 2.

On remand, the district court summarily rejected any suggestion that the Rombergs are not a prevailing party within the meaning of section 1988 and *Texas State Teachers*. *Romberg v. Nichols*, No. 83-8448 (C.D. Cal. Aug. 17, 1990). The defendants

thereupon filed a timely notice of appeal (No. 91-55012) on September 11, 1990, and the Rombergs filed a timely cross-appeal (No. 90-56125) two weeks later on September 25.[4] Pursuant to the court's invitation in its order of May 25, the Rombergs also moved this court to expedite both appeals.

Deferring action on that motion, we ordered the parties on November 5, 1990 to submit simultaneous briefs in an effort to determine several issues including (a) whether the district court had intended its order of August

---

[4] Due to an administrative error, the defendants' appeal was not assigned a docket number when it was originally filed. The error was not corrected until after the Rombergs had filed their cross-appeal. Accordingly, the defendants' appeal (No. 91-55012) has a higher docket number than the Rombergs' cross-appeal (No. 90-56125). The record reveals that despite this error both the appeal and the cross-appeal are timely.

17, 1990 to reinstate its previous fee award of January 20, 1989, (b) whether any appeal or cross-appeal would be timely or appropriate at this juncture, and (c) what issues, if any, would not be ripe for review. *Romberg v. Nichols*, No. 90-56125 (9th Cir. Nov. 5, 1990). In their respective responses, the parties agreed that the district court's most recent order had reinstated its earlier fee award and that as such, it was a final order for which appellate review would now be appropriate. We accepted those contentions; effectively granted the motion to expedite; and ordered simultaneous briefing to address the underlying issues raised in the appeal and cross-appeal. *Romberg v. Nichols*, Nos. 90-56125 & 91-55012 (9th Cir.

Dec. 27, 1990). After granting the Rombergs a brief continuance, we entertained oral argument and submitted the case for decision on May 14, 1991. *Romberg v. Nichols*, Nos. 90-56125 & 91-55012 (9th Cir. Apr. 16, 1991).

II

A

We review the factual findings underlying the district court's determination that a litigant is a "prevailing party" entitled to attorney fees under 42 U.S.C. § 1988 for clear error. *Sablan v. Department of Finance*, 856 F.2d 1317, 1324 (9th Cir. 1988). We must reverse, however, if the district court applied incorrect legal standards to reach these findings. *Lummi Indian Tribes*

v. Oltman, 720 F.2d 1124, 1125 (9th Cir. 1983). Determination of the amount of a fee award under section 1988 is reviewable for an abuse of discretion. *Jordan v. Multnomah County*, 815 F.2d 1258, 1261 (9th Cir. 1987).

B

Section 1988 provides in relevant part that:

> [i]n any action or proceeding to enforce [specified] provision[s] of [the federal civil rights laws, including 42 U.S.C. § 1983], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1988). Precisely what measure of success a litigant must achieve to attain

"prevailing party" status under this provision has not always been clear. Must the litigant prevail on all of his claims, the majority of his claims, or may a single claim suffice? If victory upon a single claim may suffice, must that claim concern the "central" issue in the litigation, merely a "significant" issue in the litigation, or may it be simply any issue at all?

The Supreme Court recently attempted to answer these questions -- and thereby resolve an intercircuit conflict -- in *Texas State Teachers*, 489 U.S. 782. There, the Court rejected the view expressed by the Fifth and Eleventh Circuits "that a party [must] succeed on the 'central issue' in the litigation and achieve

the 'primary relief sought' to be eligible for an award of attorney's fees under § 1988." *Id.* at 784 (citing *Simien v. San Antonio*, 809 F.2d 255, 258 (5th Cir. 1987), and *Martin v. Heckler*, 773 F.2d 1145, 1149 (11th Cir. 1985) (en banc)). The Court found such a formulation of the fee-shifting rule inconsistent with its earlier pronouncements in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), in which the Court previously had "sought to clarify 'the proper standard for setting a fee award where the plaintiff has achieved only limited success.'" *Texas State Teachers*, 489 U.S. at 789-90 (quoting *Hensley*, 461 U.S. at 431).

In reaffirming *Hensley*, the Court unanimously opted to embrace the

broader and less demanding standard endorsed by most of the other courts of appeals, including this one. *See Lummi Indian Tribe*, 720 F.2d at 1125, *cited in Texas State Teachers*, 489 U.S. 784. Under this standard, "the plaintiff has crossed the threshold to a fee award of some kind" if he or she "has succeeded on 'any significant issue in litigation which achieve[s] some of the benefit the parties sought in bringing suit.'" *Texas State Teachers*, 489 U.S. at 791-92 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)); *see also Lummi Indian Tribe*, 720 F.2d at 1125 (quoting same.)

The Court elaborated on its holding by stating that "at a minimum, to be considered a prevailing party

within the meaning of 1988, the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Texas State Teachers*, 489 U.S. at 792 (citation omitted). The Court added, however, that in some instances even this admittedly low standard might not be met because of the truly insignificant nature of a plaintiff's victory: "Where the plaintiff's success on a legal claim can be characterized as purely technical or *de minimis*, a district court would be justified in concluding that even the 'generous formulation' we adopt today has not been satisfied." *Id.* (citations omitted).

C

[1] Applying the Supreme Court's generous formulation to the facts of this case, we hold that the Rombergs are indeed a "prevailing party" within the meaning of section 1988. The nature of their success in the underlying action is neither "purely technical" nor "de minimis." On the contrary, the Rombergs prevailed on a significant issue, and they prevailed on the merits before a jury. Most importantly, the Rombergs' victory fundamentally altered the legal relationship between themselves and the defendants: six Los Angeles police officers acting under color of state law were found liable of depriving the Rombergs of their Fourth Amendment rights.

On facts strikingly similar to the facts at issue here, the Second Circuit concluded that a plaintiff qualified as a "prevailing party" deserving of fees under *Texas State Teachers*. *See Ruggiero v. Krzeminski*, 928 F.2d 558, 564-65 (2d Cir. 1991). In *Ruggiero*, a jury found that two New Haven police officers had violated the plaintiffs' Fourth Amendment rights by conducting an unlawful search of the plaintiffs' home, even though the officers had lawfully entered the home. *Id.* at 560-61. The jury awarded the plaintiffs no compensatory damages, but the district court, apparently following the Supreme Court's decision in *Carey v. Piphus*, 435 U.S. 247 (1978), awarded nominal damages in the amount of one dollar.

Ruggiero, 928 F.2d at 561. The court then honored the plaintiffs' request for attorney fees in the amount of $12,833.34.[5/] *Id.* at 564. On appeal, the Second Circuit affirmed both the judgment and the fee award, noting that "[t]he jury's determination that [the Ruggieros'] Fourth and Fourteenth Amendment rights were violated by the search conducted by the Officers assuredly is significant" and that "the jury's determination 'changes the legal relationship' between the Ruggieros and the Officers in that a violation of rights ha[s] been found." *Ruggiero*, 928 F.2d at 564. We find the Second Circuit analysis persuasive

---

[5/] Interestingly, the court compensated the Ruggieros' attorney at the same hourly rate ($175) that the district court applied here. *See infra* at 1670.

and hold that the Rombergs' eligibility to recover fees is equally clear in this case. *See id.*

[2] The question only becomes close if one begins to confuse -- as the defendants apparently have -- the issue of liability with the issue of damages. The fact that the jury awarded the Rombergs only one dollar each in damages does nothing to vitiate the fact that the defendants were found liable on the merits of violating the Rombergs' civil rights. Despite the amount of the award, the Rombergs still prevailed on a significant legal issue, and that alone is sufficient. *See id.* The Supreme Court made this point clear in *Texas State Teachers* when it explicitly rejected the notion that

the plaintiff must obtain "the primary relief sought"; the more appropriate inquiry, the Court explained, is whether the plaintiff has prevailed on "any significant issue." *See* 489 U.S. at 791.

[3] Indeed, the Court's "issue-relief" distinction highlights a fundamental difference between civil rights litigation, on one hand, and general civil litigation, on the other. Victory in civil rights litigation is not always measurable in ordinary economic terms. As a plurality of the Court opined in *City of Riverside v. Rivera*:

> we reject the notion that a [successful] civil rights action for damages constitutes nothing more than a private tort suit benefiting only the individual plaintiffs whose

> rights were violated. Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms. *See Carey v. Piphus*, 435 U.S. 247, 266 (1978). And, Congress has determined that "the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in 1988, over and above the value of a civil rights remedy to a particular plaintiff[.]" *Hensley*, 461 U.S. at 444, n.4 (Brennan, J., concurring in part and dissenting in part). Regardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damages awards.

477 U.S. 561, 574 (1986) (plurality opinion). In fact, as the *City of Riverside* plurality also explained, the socially beneficial "deterrent

effect [of civil rights suits] is particularly evident in the area of individual police misconduct, where injunctive relief generally is unavailable." *Id.* at 575 (plurality opinion); *see also Nephew v. City of Aurora*, 830 F.2d 1547, 1549 (10th Cir. 1987) (en banc) ("vindication [of civil rights] often can include important social benefits that are not reflected in nominal damages"), *cert. denied*, 485 U.S. 976 (1988).

[4] The dispositive inquiry for section 1988 purposes, therefore, focuses upon the legal issues at stake, not upon the prayer for relief. It focuses upon the liability stage of the proceedings, not upon the damages stage. Thus, although the Rombergs obtained virtually no monetary success

and although most of their allegations never reached trial, the jury's affirmative determination that the defendants violated the Rombergs' important civil rights is enough to render the Rombergs eligible for an award of fees. *See Ruggiero*, 928 F.2d at 564 ("Simply because the jury found that tne Ruggieros did not establish their claims in all respects does nothing to lessen the significance, or importance, of the Ruggieros' success.") As the Supreme Court explained in *Texas State Teachers*:

> The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute. Where such a change has occurred, the degree of the plaintiff's overall success goes to the

> reasonableness of a fee award, not to the availability of the award. . . *vel non*.

489 U.S. at 792-93; *see also Robinson v. Ariyoshi*, 933 F.2d 781, 783-84 (9th Cir. 1991).

Properly focusing upon the "legal relationship" between the parties -- and not upon the degree of monetary success achieved by the Rombergs -- we hold that the Rombergs prevailed on a significant issue within the meaning of *Texas State Teachers*. In the realm of civil rights, where Congress and the courts historically have sought to encourage the vindication of society's most cherished principles for their own sake, a nominal damages award does not a nominal victory make. *See Scofield v. City of Hillsborough*, 862

F.2d 759, 766 (9th Cir. 1988) ("An award of nominal damages to [the plaintiff]. . . does not diminish [the plaintiff's] eligibility for attorney fees when no special circumstances are shown to make the award of fees unjust."); *Bilbrey v. Brown*, 738 F.2d 1462, 1472 (9th Cir. 1984) (attorney fees may be awarded even where damages are nominal); *cf. Floyd v. Laws*, 929 F.2d 1390, 1402-03 (9th Cir. 1991) (where jury's special verdict awarded prevailing plaintiff zero damages, plaintiff was entitled to recover one dollar in nominal damages and a reasonable attorney fee).

To the extent that other courts have declined to adopt this reasoning, we decline to follow them. *See, e.g., Estate of Farrar v. Cain*, 941 F.2d

1311 (5th Cir. 1991) (denying recovery of fees after one-dollar judgment); *Denny v. Hinton*, 131 F.R.D. 659 (M.D.N.C. 1990) (characterizing one-dollar judgment as de minimis under *Texas State Teachers* and denying recovery of fees), *aff'd mem., Denny v. Elliott*, 937 F.2d 602, and *Lawrence v. Hinton*, 937 F.2d 603 (4th Cir. 1991); *Carr v. City of Florence*, 729 F.Supp. 783, 791 (N.D.Ala. 1990) (characterizing $100 judgment as de minimis under *Texas State Teachers* and denying recovery of fees), *aff'd mem.*, 934 F.2d 1264 (11th Cir. 1991). In so doing, however, we disavow no great wealth of authority. Only the Fifth Circuit has rejected the position that an award of nominal damages makes the plaintiff a "prevailing party" within

the meaning of section 1988. *Farrar*, 941 F.2d at 1311. We believe *Farrar*, which rested on the assumption that "the sole object of [the] suit [was] to recover money damages," *id.* at 1315, is distinguishable on that basis.

The other circuit court decisions upon which defendants' briefs rely are facially distinguishable. In *Crabtree v. Collins*, 900 F.2d 79, 82-83 (6th Cir. 1990), the district court dismissed the plaintiff's action on mootness grounds, and the court of appeals concluded that the plaintiff was not a prevailing party. Similarly, in *Higgs v. Bland*, 888 F.2d 443, 451 (6th Cir. 1989), the court of appeals affirmed the denial of an award of fees where the plaintiffs'

only success had been to obtain a judicial "suggestion" that the defendants' should modify the challenged practice.[5/] By contrast, the underlying,district court judgment in the present action is a jury verdict for the plaintiffs on the merits of their claim.

D

[5/] Our recent decision in *Robinson* is similar to the Sixth Circuit's decisions in *Crabtree* and *Higgs*, and as a result, is similarly unavailing to the defendants. In *Robinson*, we held that (a) in a circumstance similar to that in *Crabtree*, "[t]he victories won by plaintiffs were. . . swept away by application of the ripeness doctrine" and (b) in a circumstance similar to that in *Higgs*, "[a] mere 'concession' as to the effects of future, unfiled legal proceedings, even if made by a responsible official, does not amount to 'prevailing' in litigation in which the pleader took nothing." 933 F.2d at 783-85. Like the plaintiffs in *Crabtree* and *Higgs* (and unlike the Rombergs here), the plaintiffs in *Robinson* failed to procure a substantive judgment in their favor on any underlying issue, or otherwise achieve any success in the litigation, and therefore did not "prevail" in any significant sense.

The ultimate infirmity in the defendants' argument stems from the fact that the real focus of their attack is not the district court's fee order at all, but the jury's verdict.[7/] In his summation, the Rombergs' attorney informed the jury that:

> Mr. and Mrs. Romberg in this case don't want any money. They want you to vindicate their rights. If you find their rights were violated, you can award what's called nominal damages in some sum like one dollar. And I think that's all they're entitled to in this case, is nominal damages.

The defendants suggest that, without this invitation, the jury might have

---

[7/] The concurring opinion incorrectly states that this issue was not raised on appeal. On the contrary, defendants' brief repeatedly suggested that the jury would have brought in a defense verdict if not for the invitation extended by the Rombergs' attorney to award nominal damages. *See* Cross-Appellees' Brief and Appellants' Opening Brief at 7, 17, 19-22.

awarded a verdict in their favor. The district court appears to have agreed. Commenting on these closing remarks by the Rombergs attorney when it entered its $29,000 fee order, the district court stated:

> While the court does not doubt counsel's overall sincerity in this part of the argument[,] his request gave the jury a clear opportunity for a Solomonic solution. In this court's view the officers involved were acting out of genuine concern for human safety during the incident[,] and if their actions were a technical violation of the Fourth Amendment[,] that was wholly unintended. It is very likely that the jury would have returned a defense verdict but for the option of the one-dollar award, which was very pointedly suggested to them.

Romberg v. Nichols, No. 83-8448 at 2 (C.D. Cal. Jan. 20, 1989).

Part of a district court's function, however, is to prevent such "Solomonic solutions" by the jury. When a jury compromises its verdict, its verdict should not stand. *See* 6A J.Moore & J. Lucas, *Moore's Federal Practice* 59.08[4], at 113 (2d ed. 1991) ("a new trial should be granted where it appears by legally competent proof or deduction that the verdict is the result of a compromise"); *National R.R. Passenger Corp. v. Koch Indus.*, 701 F.2d 108, 110 (10th Cir. 1983) ("A compromise judgment is one reached when the jury, unable to agree on liability, compromises that disagreement and enters a low award of damages. . . . [S]uspicion should be aroused if the jury awards only nominal damages."). If the district

court believed that there was insufficient evidence to support the jury's conclusion that the Rombergs' Fourth Amendment rights had been violated, then it should have granted the defendants' motion for a judgment *non obstante veredicto*. Alternatively, the court could have granted the defendants' motions for summary judgment, directed verdict, or new trial -- all of which the court denied.

This court, however, cannot reach beyond the legal question currently before it in order to review whether the district court should have granted one of those motions. The record establishes that the jury found for the Rombergs and that their verdict was entered as the judgment of the

district court, and on the basis of that record, the Rombergs are a prevailing party eligible to recover fees under section 1988.

Lest there be any doubt, however, we are not unsympathetic to the plight of district courts faced with situations like the one presented here. When a civil rights attorney who recognizes that his own case is not especially strong drastically reduces his initial claims and asks the jury for nominal damages, the danger that he may have done so simply to try to preserve prevailing-party status is disturbingly real. In such cases, the "generous formulation" of *Texas State Teachers* is subject to abuse. Section 1988 was not intended as an artifice by which some

plaintiffs' attorneys might line their own pockets through the pursuit of questionable claims, and it is hardly meant to reward lawyers who, in the later stages of the fight, abandon their clients' interests to pursue their own when the battle seems otherwise lost.

We also recognize that the means by which district courts may prevent such abuses are limited. For example, we have recently held that it is reversible error for a district court to inform the jury of the plaintiff's eligibility to recover fees upon prevailing, thereby precluding any use of jury instructions as a means of reducing the risk of abuse. *Brooks v. Cook*, 938 F.2d 1048, 1050-53 (9th Cir. 1991). We have also recently held

that even where a jury specifically finds that the plaintiff has suffered no actual damages, a district court must award nominal damages and should provide a reasonable attorney fee so long as the jury finds a constitutional violation. *Floyd*, 929 F.2d at 1400-03.

Nonetheless, while the risk for abuse is real and while some of our decisions may indirectly limit the means by which district courts may fight that risk, district courts are not powerless in their efforts to prevent section 1988 abuses. If the Rombergs did not deserve to prevail, then they should not have, and the verdict in their favor should have been set aside. Instead, the jury's verdict was entered as the final

judgment of the court, and the court itself expressly ruled that the Rombergs are a prevailing party. The time for questioning whether the Rombergs should have prevailed is now long past.

III

A

Having determined that the Rombergs are indeed a prevailing party within the meaning of section 1988, we must next address the question raised by the Rombergs' cross-appeal: whether the district court abused its discretion in determining the amount of the fee award.

The district court's August 1990 reinstatement implicitly adopted the reasoning and conclusions of its January 1989 order. In that earlier

order, the court granted the Rombergs a recovery of $29,137.50. In arriving at this figure, the court reduced the lodestar figure of $48,562.50, representing all of the hours claimed by the Rombergs' attorney (277.5) compensated at the rate of $175 per hour, by forty percent.

When setting a fee, the district court must first set the presumptive lodestar figure. *Cunningham v. County of Los Angeles*, 879 F.2d 481, 484 (9th Cir. 1988) (*Cunningham*), *cert. denied*, 493 U.S. 1035 (1990). This is done "by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate." *Id.* Next, in rare cases, the district court may adjust the "presumptively reasonable" lodestar figure based upon

the factors listed in *Kerr v. Screen Extras Guild*, 526 F.2d 67, 69-70 (9th Cir. 1975) (*Kerr*), *cert. denied*, 425 U.S. 951 (1976), "that have not been subsumed in the lodestar calculation." *Cunningham*, 879 F.2d at 484. When reducing the lodestar, the district court must state "which factors it is relying on and explain[] its reasoning." *Id.* at 487.

As a general rule, while the courts are given "latitude to balance and weigh permissible factors, any reliance on factors that have been held to be subsumed in the lodestar determination will be considered an abuse of the trial court's discretion." *Id.* The Supreme Court has stated that "the novelty [and] complexity of the issues, the special

skill and experience of counsel, the quality of representation, and the results obtained from the litigation are presumably fully reflected in the lodestar amount, and thus cannot serve as independent bases for increasing the basic fee award." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986) (Delaware Valley) (internal quotations omitted). However, in certain "exceptional cases," a district court may adjust the lodestar based upon some of these "subsumed" factors. *Cunningham*, 879 F.2d at 489 (the lodestar may be adjusted based upon the "results obtained" in "exceptional" cases). But the district court must explain why the

factor is not adequately reflected in the lodestar. *Id.*

The primary concern of the appellate courts, therefore, appears to be that the district court not consider the "subsumed" factors both when it sets the lodestar and when it examines the increasing or reducing factors. *See Delaware Valley*, 478 U.S. at 566; *Cunningham*, 879 F.2d at 489. Whether the district court engaged in such double counting must be our primary inquiry in determining whether a remand is necessary. *See Delaware Valley*, 478 U.S. at 566; *Corder v. Gates*, Nos. 88-5555 and 88-5588, slip op. 14277, 14283-85 (9th Cir. Oct. 16, 1991) (*Corder*); *Cunningham*, 879 F.2d at 489.

Although the district court failed to follow strictly the approach outlined above, there is no evidence of double counting and the fee award appears to be justified. Contrary to the dissent's assertion, the district judge did not concede that the hours worked and rate charged were reasonable. Rather than making a separate finding that the hours worked and the rate charged were reasonable, the district court considered all twelve *Kerr* factors together. When the district judge stated that he was accepting the hours worked at "face value," he was not holding that the hours worked were reasonable in light of the novelty of the issues, the results obtained, and the other *Kerr* factors that have been held to be

subsumed in the calculation of the lodestar. *See Delaware Valley*, 478 U.S. at 565; *Jordan v. Multnomah County*, 815 F.2d 1258, 1262 & n. 6 (9th Cir. 1987). Rather, the district court was merely acknowledging the assertion of the number of hours spent on the case and what the attorney believed was a reasonable hourly fee. Therefore, the district court was not engaging in double counting by reducing the award by forty percent based upon novelty and difficulty of the issues, skill requisite to perform the services, and results obtained.

Nor was the district court's justification of the basis for reduction of the award insufficient. "Although the district courts must be given much discretion to shape awards

of attorney's fees, these awards must be subject to appellate review, and they must be reversed if based on clearly erroneous considerations." *Corder*, slip op. at 14288. In this case, however, the district court articulated "sound reasons" in support of the fee award. *See id.*

First, the district judge reduced the fee award based upon the lack of novelty of the issues. *Romberg v. Nichols*, No. CV83-8448 RG, at 2 (C.D. Cal. Jan. 20, 1989) (order awarding attorney's fees) (*Romberg*). The dissent contends that the district judge concluded that the issues were not novel merely because the Rombergs' attorney requested only nominal damages. However, the district judge's order does not state that the

request for nominal damages is the only reason that the case is not novel. This was a relatively simple and uncomplicated case. Thus, the district judge's conclusion that the case was not novel is a valid justification for reducing the fee award.

Second, the district judge found that the third *Kerr* factor, the skill requisite to perform properly the services, justified a reduction. *Id.* at 3; *see Kerr*, 526 F.2d at 70. The district judge explained that the Rombergs' attorney "should have realized that there was little or nothing to support the claims that never got to the jury." *Romberg*, No. CV83-8448 RG, at 3. The dissent contends that the district judge was

essentially reducing the award to take into account the time spent on claims that were dismissed. The dissent concludes that this was double counting because the district judge had already determined that the elements comprising the lodestar were reasonable and the hours used to calculate the lodestar did not include time spent on the dismissed claims. However, as discussed above, the district judge did not determine that the elements used to calculate the lodestar were reasonable. Therefore, the district judge was not double counting. Moreover, the dissent has missed the point: the district judge was merely examining all of the relevant facts to determine whether the fee was reasonable in light of the

skill requisite to properly perform the legal services. Thus, the district court's analysis was not based on clearly erroneous considerations.

Finally, the district judge determined that the result obtained warranted reducing the lodestar. *Id.* Clearly, the result obtained is a legitimate factor to be considered by a district judge. *See, e.g., Cunningham*, 879 F.2d at 486, 488-89. The dissent contends that the district judge reduced the award merely because the Rombergs were awarded nominal damages. However, the "vindication" obtained by the Rombergs also does not appear to have resulted in any highly significant benefit to the Rombergs or society in general. The district

court's decision, therefore, was justified.

The reducing factors relied upon by the district judge would have been permissible justifications to reduce the elements used to arrive at the lodestar figure. *See Delaware Valley*, 478 U.S. at 565-66; *Cunningham*, 879 F.2d at 484-86. The district court merely chose to reduce the lodestar itself rather than the individual figures used to calculate it. This is an unusual case where it is clear that there has been no double counting and a consideration of the factors indicates that the fee award was clearly warranted. As we have stated before:

> Mathematically, it is inconsequential whether the lodestar figure itself is

> adjusted for lack of success or whether the reasonable hours component of the lodestar is adjusted for lack of success. What matters is that the district court did not "count" for lack of success twice. We therefore hold that the district court's reduction of the lodestar, if warranted, constitutes a "harmless error."

Cabrales v. County of Los Angeles, 864 F.2d 1454, 1465 (9th Cir. 1988), *vacated on other grounds*, 490 U.S. 1087 (1989), *reinstated*, 886 F.2d 235 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1838 (1990). Therefore, although the district court did not follow the correct methodology, we believe that under the facts of this case, "any error was harmless." *Corder*, slip op. at 14285.

[5] Based on this analysis, how should we review the action of the

district court? Clearly it is whether the district court abused its discretion. *Id.* at 14282. In making this assessment, we are to be guided by three principles:

> First, discretionary judgments of the district courts, which watch civil rights cases unfold before them, must be respected. Second, the discretion of the district courts must not be unduly limited by mechanistic rules. Third, fee awards must ensure that civil rights lawyers receive *reasonable* compensation for their services. This third principle limits the district court's discretion, for this third principle underlies the requirement that the district courts carefully calculate hours and rates and fully articulate their reasoning.

*Id.*at 14283 (emphasis in original; footnote omitted). Based upon these principles, we hold that there was no abuse of discretion. We must be

careful not to drift into a more restricted standard of review, but should allow the district court the discretion we assert it has to settle fees.

B

As a final consideration, we must determine (a) whether all of the myriad proceedings in this litigation represent compensable legal work and (b) whether a further assessment should be ordered to compensate the Rombergs' attorney for the delay suffered in having to wait for his recovery.

1

The first question is significant because, in its order of January 20, 1989, the district court apparently did not allow the Rombergs any

compensation for their defense of the initial appeal to this court or for the subsequent remand. Furthermore, because the district court's August 1990 order essentially reinstated the January 1989 order, the current fee award fails to compensate the Rombergs' attorney for any of the proceedings that have followed January 1989.

In light of our recent decision in *Cabrales v. County of Los Angeles*, 935 F.2d 1050 (9th Cir. 1991), we hold that the Rombergs are entitled to recover fees for these additional stages of the proceedings as well: "a plaintiff who is unsuccessful at a stage of litigation that was a necessary step to her ultimate victory is entitled to attorney's fees even

for the unsuccessful stage." *Id.* at 1053.[2]

2

Turning to the question of compensation for delay, the law undeniably authorizes such a recovery where it is appropriate. As the Supreme Court recently explained:

> Clearly, compensation received several years after the services were rendered -- as it frequently is in complex civil rights

---

[2] In holding that an attorney is entitled to recover fees for efforts expended on unsuccessful intermediate stages of litigation, *Cabrales* did not hold that an attorney is entitled to recover fees for efforts expended on all unsuccessful claims and legal theories that the attorney at one time may have raised or pursued. The notion that we embraced in *Cabrales* is that an attorney should be compensated for those efforts that reasonably may be considered to be steps along the path to ultimate victory, whether or not every individual step was itself successful. *See Cabrales*, 935 F.2d at 1053. That does not mean, however, that the court must compensate the attorney for efforts expended on extraneous and dismissed claims that did not contribute to the victory. The proper focus is upon time expended on efforts that ultimately proved successful.

> litigation -- is not equivalent to the same dollar amount received reasonably promptly as the legal services are performed, as would normally be the case with private billings. We agree, therefore, that an appropriate adjustment for delay in payment -- whether by the application of current rather than historic hourly rates or otherwise -- is within the contemplation of [section 1988].

Missouri v. Jenkins ex rel. Agyei, 491 U.S. 274, 283-84 (1989) (footnote omitted); *see also Spain v. Mountanos*, 690 F.2d 742, 747-48 (9th Cir. 1982) (awarding interest on attorney fees under 42 U.S.C. § 1988). Accordingly, the district court should account for the propriety of an interest adjustment to compensate for the delay in recovery on remand.

IV

[6] We affirm the district court's judgment that the Rombergs are a prevailing party within the meaning of section 1988 and *Texas State Teachers*. We also affirm the district court's calculation of the fee award for proceedings up to the January fee award order. We remand, however, for calculation of an appropriate fee award for subsequent proceedings, as well as appropriate compensation for delay.

AFFIRMED and REMANDED for further proceedings.

WALLACE, Chief Judge, concurring:

I concur in the majority opinion except I agree only with the result in part II that the Rombergs were prevailing parties entitled to a fee

award under 42 U.S.C. § 1988. I write separately on this issue because I do not fully agree with the majority's reasoning.

In part II, the majority holds that the Rombergs are prevailing parties because they prevailed on a significant issue in the litigation. I agree with this conclusion.

In *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782 (1989) (*Texas State Teachers*), the Supreme Court held that "[i]f the plaintiff has succeeded on any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing the suit, the plaintiff has crossed the threshold to a fee award of some kind." *Id.* at 791-92

(internal quotations omitted). The Court explained that "at a minimum, . . . the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Id.* at 792.

The Supreme Court, however, limited its holding by stating that "[w]here the plaintiff's success on a legal claim can be characterized as purely technical or *de minimis*, a district court would be justified in concluding that even the 'generous formulating' we adopt today has not been satisfied." *Id.* Therefore, under certain conditions even a victory on a constitutional issue may be considered *de minimis*. For example, the Court stated that the

Texas State Teachers Association would not have been considered a prevailing party if the Association's only success was the district court's conclusion "that the requirement that nonschool hour meetings be conducted only with prior approval from the local school principal was unconstitutionally vague." *Id.* The Court explained that this success would be considered *de minimis* because "[t]he District Court characterized this issue as of minor significance and noted that there was no evidence that the plaintiffs were ever refused permission to use school premises during nonschool hours." *Id.* (internal quotations omitted).

Under the standards established in *Texas State Teachers*, I believe

that the Rombergs were prevailing parties. The jury found that the police officers violated the Rombergs' constitutional rights and awarded the Rombergs nominal damages of one dollar each. There is an intercircuit conflict on whether a party is entitled to prevailing party status when he or she is only awarded nominal damages. *See, e.g., Estate of Farrar v. Cain*, 941 F.2d 1311, 1315-17 (5th Cir. 1991) (declining to award attorney's fees); *Ruggiero v. Krzeminski*, 928 F.2d 558, 564-65 (2d Cir. 1991) (awarding attorney's fees). However, nothing in *Texas State Teachers* persuades me that the Rombergs should be denied prevailing party status merely because they were only awarded nominal damages. The

Rombergs prevailed on a significant issue in the litigation. As pointed out by the majority, "the Rombergs' victory fundamentally altered the legal relationship between themselves and the defendants: six Los Angeles police officers acting under color of state law were found liable of depriving the Rombergs of their Fourth Amendment rights." This is hardly similar to the example of a *de minimis* victory given by the Supreme Court in *Texas State Teachers*. *See Texas State Teachers*, 489 U.S. at 792.

But I believe the majority's emphasis of the "issue-relief" distinction is misleading. The key to the prevailing party inquiry is determining whether the plaintiff "succeeded on any significant issue in

litigation which achieve[d] some of the benefit the parties sought in bringing suit." *Id.* at 791-92 (internal quotations omitted). In making this determination, we almost certainly would have considered the magnitude of the award relevant if the Rombergs were awarded five million dollars in damages. The majority's analysis appears to make the consideration of the magnitude of the award irrelevant.

I also believe that the discussion of compromise verdicts in part II D of the majority opinion is unnecessary to the decision in this case and misleading. The only question before us is the propriety of the fee award. Nichols has not properly raised the issue of whether

the verdict should be overturned as a compromise verdict. As the majority opinion recognizes, we "cannot reach beyond the legal question currently before" us and "[t]he time for questioning whether the Rombergs should have prevailed is now long past." The majority's discussion is completely unnecessary and should be considered as mere dicta.

O'SCANNLAIN, Circuit Judge, dissenting in part:

I dissent only from Part III-A of the court's opinion which affirms the forty percent reduction of the fee award. In my view, the reasons cited by the district court were insufficient to justify departure from

the presumptively reasonable lodestar figure.

I

In calculating the fee award, the district court first set a lodestar figure of $48,562.50, representing all of the hours claimed by the Rombergs' attorney (277.5) compensated at the rate of $175 per hour. In so doing, the court expressly "accepted at face value" the hours submitted by the Rombergs' attorney and expressly selected the $175 rate. *Romberg v. Nichols*, No. 83-8448 at 2, 3 (C.D. Cal. Jan. 20, 1989). The court then specifically addressed all twelve of the factors identified by the *Kerr* court as relevant to any departure

from the lodestar.[1] *See Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975) (adopting twelve factors identified by the Fifth Circuit as appropriate for this purpose in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974)), *cert. denied*, 425 U.S. 951 (1976); *see also Hensley*, 461 U.S. at 429-30 (nothing that the Senate and House Reports on section 1988 both favorably cited the twelve *Johnson* factors).

---

[1] The majority interprets the district court's order as considering the *Kerr* factors simultaneously with setting the lodestar. Although I disagree with this interpretation, it is immaterial to the result. Whatever the order in which the award amount was calculated, the reducing factors relied on were impermissible in light of the district court's concession that the hours claimed and fee set were reasonable.

The court determined that three of the factors justified a reduction of the fee: (a) the novelty and difficulty of the questions involved, (b) the skill requisite to perform the legal services properly, and (c) the amount involved and the results obtained. *See Kerr*, 526 F.2d at 70 (the second, third, and eighth factors). The Rombergs now contend that the district court abused its discretion in using these three factors to reduce the lodestar by forty percent. I agree.

In *Jordan v. Multnomah County*, 815 F.2d 1258 (9th Cir. 1987), we acknowledged that "[a] 'strong presumption' exists that the lodestar figure represents a 'reasonable' fee." *Id.* at 1262 (quoting *Pennsylvania v.*

Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 565 (1986)). Although the district court has broad discretion to determine the amount of a fee award, it must justify any departure from the lodestar figure if the hours and rate that determine the lodestar are themselves reasonable. *See Delaware Valley Citizens' Council*, 478 U.S. at 564-65; *Blum v. Stenson*, 465 U.S. 886, 897 (1984); *see also Long v. IRS*, 932 F.2d 1309, 1313-14 & n. 4 (9th Cir. 1991) (per curiam). This justification must include more than a bare statement of the *Kerr* factors relied on; the district court must also supply an explanation of the application of those factors to the case. *See Cunningham v. County of Los Angeles*, 879 F.2d 473, 488 (9th Cir.

1988). Here, in light of the district court's own admission of the reasonableness of both the hours claimed and the rate to be applied, I conclude that the court's purported justifications are inadequate to support its forty-percent downward departure.

A

In discussing the second *Kerr* factor, the district court explained:

> 2. The case was not novel. It did take skill under the circumstances, but the above observation about the jury's option [to produce a Solomonic solution by awarding nominal damages] is a reducing factor.

Romberg v. Nichols, No. 83-8448 at 2 (C.D. Cal. Jan 20, 1989). The court's analysis here is a non sequitur that appears to penalize the Rombergs for

having prevailed in the first place. The court first states that "[t]he case was not novel" and then concludes that because the Rombergs' attorney invited nominal damages, that invitation constitutes a reducing factor. An attorney's request for nominal damages at the end of a trial, however, says nothing about the "novelty and difficulty of the questions involved"; there is no logical connection here. More importantly, reducing the fee award on the basis of a belief that the jury would have found for the defendants if not presented with the option of awarding nominal damages is clearly impermissible. As we explained *ante*, at Part II-D of the court's opinion, if a district court concludes that the

evidence does not support the jury's verdict, the appropriate course of action is to set aside the verdict -- not to penalize the prevailing attorney.

B

With respect to the third *Kerr* factor -- "the skill requisite to perform the legal services properly" -- the district court explained:

> 3. Mr. Yagman is a skilled and effective civil rights lawyer. As such, however, he should have realized that there was little or nothing to support the claims that never got to the jury -- again, a significant reducing factor.

Romberg v. Nichols, No. 83-8448 at 3 (C.D. Cal. Jan. 20, 1989). The Rombergs maintain that this reduction is also impermissible because none of the 277.5 hours billed was spent on

claims that did not proceed to trial. This argument is equally meritorious. If the lodestar does not include the hours spent on dismissed claims, then any subsequent reduction for those hours constitutes double discounting. In any event, the proper stage at which to reduce a fee award for time that is not compensable is during the calculation of the lodestar. Here, the court expressly found that the elements comprising the lodestar were reasonable. A subsequent discount by an undefined percentage on the basis of alleged overbilling is inconsistent with that determination and cannot suffice to rebut the presumption of correctness acknowledged by this court in *Jordan*.

C

Finally, in applying the eighth *Kerr* factor -- "the amount involved and the results obtained" -- the district court concluded:

> 8. The results obtained were (i) $2.00 in cash and (ii) "vindication." If all plaintiffs wanted was vindication they could have made the case a straightforward Fourth Amendment claim from the outset. This is clearly a reducing factor.

Romberg v. Nichols, No. 83-8448 at 3 (C.D. Cal. Jan. 20, 1989). The Supreme Court, however, has expressly "reject[ed] the proposition that fee awards under 1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers." *City of Riverside*, 477 U.S. at 574 (plurality opinion); *see also id.*at 585 (Powell,

J., concurring in judgment and similarly rejecting a proportionality rule). This court has gone even one step further, recognizing that although the size of an award can be a permissible consideration, the smallness of an award alone cannot justify reduction of the attorney's fee. *See Jordan*, 815 F.2d at 1262 & n. 6 (citing *Hensley* and noting that the second, third, eighth and ninth factors identified in *Johnson v. Kerr* "cannot serve as independent bases for adjusting fee awards"); *see also Long*, 932 F.2d at 1314 & n. 4 (explaining same). The substance of the prevailing claim, rather than the amount of relief received, is the central concern for section 1988 purposes. *See Greater Los Angeles*

Council on Deafness v. Community Television, 813 F.2d 217, 222 (9th Cir. 1987). Indeed, as the Supreme Court recently explained, "[t]he intention of Congress [in enacting section 1988] was to encourage successful civil rights litigation, not to create a special incentive to prove damages . . . " *Blanchard v. Bergeron*, 489 U.S. 87, 95 (1989). What the attorney has earned is a wholly independent consideration from what the jury believes his clients have suffered.

II

In light of these considerations, I would reverse the district court's fee determination, and remand for recalculation in a manner consistent with the foregoing analysis of the law

of this circuit.

APPENDIX B

Michael ROMBERG, Debra Romberg, Plaintiff-Appellees-Cross-Appellants,

v.

Robert NICHOLS, Dennis Lazzari, Hugh Lloyd, Johnny Jurtado, Thomas Laing, Diane Hannon, R.D. Campbell, Defendants-Appellants-Cross-Appellees.

Nos. 90-56125, 91-55012.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted May 14, 1991.

Decided Jan. 13, 1992
As Amended Feb. 20, 1992

Prevailing plaintiffs in civil rights suit sought attorney fees. The United States District Court for the Central District of California awarded $5,000. Defendants appealed. The Court of Appeals, 855 F.2d 862, vacated and remanded without published opinion. On remand, the District Court increased award, and defendants

appealed. The Court of Appeals, 904 F.2d 41, vacated and remanded without published opinion. On remand, the District Court, Richard A. Gadbois, Jr., J. rejected any suggestion that plaintiffs were not prevailing parties. Appeal and cross appeal were taken. The Court of Appeals, held that: (1) plaintiffs were prevailing parties, even though they were awarded nominal damages of only $1, and (2) amount of award was permissible.

Affirmed and remanded.

Wallace, Chief Judge, concurred in part, concurred in result in part, and filed opinion.

O'Scannlain, Circuit Judge, dissented in part and filed opinion.

1. Federal Courts 878, 914

Court of Appeals reviewe for clear error factual findings underlying district court's determination that litigant is prevailing party entitled to attorney fees under civil rights statute, but reversal is required if district court applies incorrect legal standards to reach the findings. 42 U.S.C.A. § 1988.

2. Federal Courts 830

Determination of amount of fee award under civil rights attorney fee statute is reviewable for abuse of discretion. 42 U.S.C.A. § 1988.

3. Civil Rights 296

Tenants prevailed on significant legal issue that search of apartment violated Fourth Amendment and, therefore, fit within category of

"prevailing party" under civil rights attorney fee statute, even though tenants recovered nominal damages of only $1; tenants fundamentally altered legal relationship between themselves and police officers. 42 U.S.C.A. § 1988; U.S.C.A. Const.Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

4. Civil Rights 296

Dispositive inquiry for purposes of civil rights attorney fee statute focuses upon legal issues at state, not upon prayer for relief; it focuses upon liability stage of proceedings, not upon damages state. 42 U.S.C.A. § 1988.

5. Federal Civil Procedure 1974

When jury comprises its verdict, verdict shall not stand.

6. Civil Rights 293

Civil rights attorney fee statute is not intended as artifice by which some plaintiffs' attorney might line their own pockets through pursuit of questionable claims, and it is hardly meant to reward lawyers who, in later stages of fight, abandon their clients' interest to pursue their own when battel seems otherwise lost. 42 U.S.C.A. § 1988.

7. Civil Rights 302

District court did not engage in double counting by reducing award under civil rights attorney fee statute by 40% based upon novelty and difficulty of issues, skill requisite to perform services, and results obtained, and, thus, amount claimed by attorneys who properly reduced, even

though district court stated that it was accepting hours worked at face value, and even though district court did not follow correct methodology; district court was merely acknowledgin assertion of number of hours spent on case and what attorney believed was reasonable hourly fee. 42 U.S.C.A. § 1988; U.S.C.A. Const.Amend. 4.

8. Federal Civil Procedure 2737.4

When setting a fee, district court must first set presumptive lodestar figure by multiplying number of hours reasonably expended on litigation by reasonable hourly rate.

9. Federal Civil Procedure 2737.4

District court may adjust presumptively reasonable lodestar figure based upon factors that have

not been subsumed in lodestar calculation.

10. Federal Civil Procedure 2737.4

When reducing lodestar, district court must state which factors it is relying on and explain its reasoning.

11. Federal Civil Procedure 2737.4

As general rule, while courts are given latitude to balance and weigh permissible factors, any reliance on factors that have been held to be subsumed in lodestar determination will be considered abuse of trial court's discretion.

12. Federal Civil Procedure 2737.4

In certain exceptional cases, district court may adjust lodestar based upon some subsumed factors, but district court must explain why factor

is not adequately reflected in lodestar.

13. Federal Courts 830

Amount of attorney fee award arrived at by incorrect methodology what to be reviewed for abuse of discretion. 42 U.S.C.A. § 1988.

14. Civil Rights 301,306

Prevailing plaintiffs who were entitled to attorney fees under civil rights statute were entitled to compensation for defense of initial appeal and for subsequent remand, whether or not plaintiffs were successful at those stages. 42 U.S.C.A. § 1988.

15. Interest 14

Prevailing plaintiffs who were entitled to attorney fees under civil rights statute were entitled to

interest adjustment to compensate for delay in recovery. 42 U.S.C.A. § 1988.

Stephen Yagman, Yagman and Yagman, Venice, Cal., for the plaintiffs-appellants.

Keith A. Fink, Cotkin, Collins & Franscell, Los Angeles, Cal., for the defendants-appellees.

Appeal from the United States District Court for the Central District of California.

Before WALLACE, Chief Judge, THOMPSON and O'SCANNLAIN, Circuit Judges.

PER CURIAM:

A jury awarded the Rombergs nominal damages of one dollar each in their civil rights action against six Los Angeles police officers. The question before us now is whether that victory is too insignificant to deem the Rombergs a "prevailing party" for purposes of recovering attorney fees under 42 U.S.C. § 1988, in light of the Supreme Court's intervening decision in *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782 (1989).[1/]

[1/] This appeal presents what is largely a question of first impression in this circuit. Only five prior decisions by this court have addressed *Texas State Teachers*. *See Sanchez v. City of Santa Ana*, 936 F.2d 1027 (9th Cir. 1991); *Robinson v. Ariyoshi*, 933 F.2d 781 (9th Cir. 1991); *Duran v. City of Douglas*, 904 F.2d 1372 (9th Cir. 1990); *Lear Siegler, Inc. v. Lehman*, 893 F.2d 205 (9th Cir. 1990); *Herrington v. County of Sonoma*, 883 F.2d 739 (9th Cir. 1989). None of these cases addressed the Supreme Court's decision in any detail, and only three concerned those portions of the Court's holding that are relevant to this appeal. *See Sanchez*, 936 F.2d at 1041 (summarily ruling that

We conclude that it is not. We therefore affirm the district court's judgment to award fees. We also affirm the district court's determination of the amount of fees to be awarded for services through the date of the fee order. We remand, however, for calculation of fees due for subsequent proceedings.

---

denial of attorney fees to victorious plaintiff was abuse of discretion under *Texas State Teachers*); *Robinson*, 933 F.2d at 784-85 (finding no entitlement to fees under *Texas State Teachers* where subsequent decision had vacated previous favorable judgment on ripeness grounds); *Lear Siegler* 893 F.2d at 208 (finding no entitlement to fees under *Texas State Teachers* where plaintiff was "granted no relief in its underlying. . . claim and [where] its efforts resulted in no change in [the defendant's] procedures"); *see also Duran*, 904 F.2d 1379 (citing *Texas State Teachers* for proposition that attorney fees may be awarded pendente lite); *Herrington*, 883 F.2d at 742 (same). A number of district courts within this circuit have considered *Texas State Teachers* more thoroughly. *See, e.g., Achaval-Bianco v. Gustafson*, 736 F.Supp, 214, 215 (C.D. Cal. 1989) (finding entitlement to fees under *Texas State Teachers* where plaintiffs have received some benefit on some claims before settlement of litigation). Even these decisions, however, provide little guidance on how to apply *Texas State Teachers*.

I

A

On a May evening in 1982, two Los Angeles police officers responded to a call indicating a domestic disturbance at the Rombergs' address.[2/] When the officers arrived at the address, they found approximately ten people gathered in front of the building and pointing toward the Rombergs' apartment. They also heard loud voices and pounding noises, and they entered they building to investigate. As they ascended the stairway leading to the Rombergs' apartment, the officers heard a woman crying, a loud male voice, and once again, "some type

---

[2/] The Rombergs were not married at the time these events took place. Nonetheless, we refer to them as "the Rombergs" and as "Mr. and Mrs. Romberg" for convenience.

of pounding." They also sensed an odor in the stairwell and hallway that resembled ether, a substance that they understood is often associated with narcotics.

After reaching the Rombergs' apartment, the two officers observed through a screen door a young woman seated on the floor with a man standing alongside her. The man, later identified as Michael Romberg, was allegedly yelling and shaking his fist at the woman. The woman, later identified as Debra Romberg, was only partially clad and was beating an object on the floor. The pair's behavior, coupled with the scent of ether, allegedly suggested to the officers that the Rombergs might be

under the influence of drugs, specifically phencyclidine (or "PCP").

Out of concern for the woman's safety as well as for their own, the officers retreated and requested back-up units before proceeding further. Three units soon arrived, and before the first officers could fully explain what was happening, a loud crash and scream emanated from the Rombergs' apartment. Allegedly fearing that the woman had been seriously injured, the officers ran back up the stairs. When they could not see the woman, they decided to enter the apartment.

Mr. Romberg immediately resisted, telling the officers that they had no right to enter his home and poking one of the officers in the chest as the officer advanced in search of the

woman. Two officers thereupon arrested and handcuffed Mr. Romberg for interfering with their search and for disturbing the peace. A male and female officer then located Mrs. Romberg in her bed, clothed her, and brought her out into the living room. At this point, another police officer observed on a coffee table what he identified as narcotics paraphernalia: a cocaine pipe, a small amber vial, and a beaker. After determining that Mrs. Romberg was not harmed, the officers then undertook to search the Rombergs' apartment for any further evidence of drugs. As it turned out, the Rombergs' apartment had not been the source of the suspicious odor.

B

On December 23, 1983, the Rombergs filed suit, alleging that the police had violated their constitutional rights by not obtaining a search warrant before entering their home. They also alleged excessive force, conspiracy, malicious prosecution, and false arrest claims. The Rombergs named seven police officers and the County of Los Angeles as defendants and prayed for $2 million in general and punitive damages, plus costs and fees. The district court dismissed the County, one police officer, and most of the Rombergs' claims before trial, but it declined to dismiss the Fourth Amendment claim against the remaining defendants. In fact, the court denied consecutive motions to that effect at

the pleading stage, the summary judgment stage, and the directed verdict stage.

After a four-day trial, the jury returned a verdict for the Rombergs with a nominal award of one dollar each. The amount of the award apparently followed the invitation of the Rombergs' attorney, who in his summation "[had] not ask[ed] for money, other than a perfunctory request for punitive damages." *Romberg v. Nichols*, No. 83-8448 at 1 (C.D. Cal. Jan. 20, 1989). Indeed, the Rombergs' attorney specifically informed the jury that, in his view, his clients were only entitled to damages "'in some sum like one dollar.'" *Id.* at 2 (quoting trial transcript).

The district court then denied the defendants' alternative motions for j.n.o.v. and new trial and granted the Rombergs' motion for attorney fees. *Romberg v. Nichols*, No. 83-8448 (C.D. Cal. Nov. 30, 1987). The court, however, lowered the amount of the fee award from $45,000, the amount which the Rombergs had requested, to only $5,000. To account for this reduction, the Court explained:

> The court has some reason to question whether all the time claimed by counsel was warranted, but careful analysis of that is unnecessary. Suffice it to say: (i) the result achieved was fairly modest in tangible terms, (ii) it did not require exceptional legal talent to do it -- (no reflection on counsel's well-documented expertise), [and] (iii) the award is just and reasonable in light of the claims put forth and the brevity of the trial.

Id. at 1.

The defendants appealed, contending that this reduced fee award was inappropriate, and a prior panel of this court, finding that it was "unable to review the order" as written, vacated and remanded with instructions for the district court to issue a more detailed order. *Romberg v. Nichols*, No. 87-6724 at 1 (9th Cir. Aug. 16, 1988) [855 F.2d 862 (Table)]. The court of appeals explained that effective review was not possible because the district court had not (a) set a lodestar figure and (b) specified the reasons for its reduction pursuant to an analysis of the twelve factors identified in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975), *cert.*

denied, 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d 195 (1976).

On remand, the district court issued a four-page order awarding the Rombergs attorney fees in the amount of $29,137.50.[3] *Romberg v. Nichols*, No. 83-8448 (C.D. Cal. Jan. 20, 1989). The court initially set a lodestar figure of $48,562.50, which represented all the hours claimed by the Rombergs' attorney (277.5) compensated at the rate of $175 per hour. The court then discounted this figure by forty percent pursuant to its evaluation of the *Kerr* factors.

---

[3] Nichols argues that the remand order did not permit the district court to increase its fee award to this extent. This argument is without merit. The order left the district court free to adjust the award as it saw fit upon consideration of the relevant factors.

Once again the defendants appealed, contending that in light of the Supreme Court's intervening decision in *Texas State Teachers*, the Rombergs are not entitled to any fees at all. The Rombergs, meanwhile, cross-appealed, insisting that the district court's fee award was still unjustifiably low. On May 25, 1990, this court again vacated the district court's order and remanded for a specific determination of whether *Texas State Teachers* does in fact indicate that the Rombergs are not entitled to recover any fees. *Romberg v. Nichols*, Nos. 89-55202 & 89-55218 (9th Cir. May 25, 1990) [904 F.2d 41 (Table)]. In so doing, we did not reach the issues raised in the Rombergs' cross-appeal, but we

indicated that any future appeals would be handled on an expedited basis. *See id.* at 2.

On remand, the district court summarily rejected any suggestion that the Rombergs are not a prevailing party within the meaning of section 1988 and *Texas State Teachers*. *Romberg v. Nichols*, No. 83-8448 (C.D. Cal. Aug. 17, 1990). The defendants thereupon filed a timely notice of appeal (No. 91-55012) on September 11, 1990, and the Rombergs filed a timely cross-appeal (No. 90-56125) two weeks later on September 25.[4/] Pursuant to

---

[4/] Due to an administrative error, the defendants' appeal was not assigned a docket number when it was originally filed. The error was not corrected until after the Rombergs had filed their cross-appeal. Accordingly, the defendants' appeal (No. 91-55012) has a higher docket number than the Rombergs' cross-appeal (No. 90-56125). The record reveals that despite this error both the appeal and the cross-appeal are timely.

the court's invitation in its order of May 25, the Rombergs also moved this court to expedite both appeals.

Deferring action on that motion, we ordered the parties on November 5, 1990 to submit simultaneous briefs in an effort to determine several issues including (a) whether the district court had intended its order of August 17, 1990 to reinstate its previous fee award of January 20, 1989, (b) whether any appeal or cross-appeal would be timely or appropriate at this juncture, and (c) what issues, if any, would now be ripe for review. *Romberg v. Nichols*, No. 90-56125 (9th Cir. Nov. 5, 1990). In their respective responses, the parties agreed that the district court's most recent order had reinstated its earlier fee award and

that as such, it was a final order for which appellate review would now be appropriate. We accepted those contentions; effectively granted the motion to expedite; and ordered simultaneous briefing to address the underlying issues raised in the appeal and cross-appeal. *Romberg v. Nichols*, Nos. 90-56125 & 91-55012 (9th Cir. Dec. 27, 1990). After granting the Rombergs a brief continuance, we entertained oral argument and submitted the case for decision on May 14, 1991. *Romberg v. Nichols*, Nos. 90-56125 & 91-55012 (9th Cir. Apr. 16, 1991).

II

A

[1,2] We review the factual findings underlying the district

court's determination that a litigant is a "prevailing party" entitled to attorney fees under 42 U.S.C. § 1988 for clear error. *Sablan v. Department of Finance*, 856 F.2d 1317, 1324 (9th Cir. 1988). We must reverse, however, if the district court applied incorrect legal standards to reach these findings. *Lummi Indian Tribes v. Oltman*, 720 F.2d 1124, 1125 (9th Cir. 1983). Determination of the amount of a fee award under section 1988 is reviewable for an abuse of discretion. *Jordan v. Multnomah County*, 815 F.2d 1258, 1261 (9th Cir. 1987).

B

Section 1988 provides in relevant part that:

> [i]n any action or proceeding to enforce

> [specified] provision[s] of [the federal civil rights laws, including 42 U.S.C. § 1983], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1988). Precisely what measure of success a litigant must achieve to attain "prevailing party" status under this provision has not always been clear. Must the litigant prevail on all of his claims, the majority of his claims, or may a single claim suffice? If victory upon a single claim may suffice, must that claim concern the "central" issue in the litigation, merely a "significant" issue in the litigation, or may it be simply any issue at all?

The Supreme Court recently attempted to answer these questions -- and thereby resolve an intercircuit conflict -- in *Texas State Teachers*, 489 U.S. 782, 109 S.Ct. 1486. There, the Court rejected the view expressed by the Fifth and Eleventh Circuits "that a party [must] succeed on the 'central issue' in the litigation and achieve the 'primary relief sought' to be eligible for an award of attorney's fees under § 1988." *Id.* at 784, 109 S.Ct. at 1489 (citing *Simien v. San Antonio*, 809 F.2d 255, 258 (5th Cir. 1987), and *Martin v. Heckler*, 773 F.2d 1145, 1149 (11th Cir. 1985) (en banc)). The Court found such a formulation of the fee-shifting rule inconsistent with its earlier pronouncements in *Hensley v.*

Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), in which the Court previously had "sought to clarify 'the proper standard for setting a fee award where the plaintiff has achieved only limited success.'" *Texas State Teachers*, 489 U.S. at 789-90, 109 S.Ct. at 1491-92 (quoting *Hensley*, 461 U.S. at 431, 103 S.Ct. 1Xat938).

In rffirming *Hensley*, the Court unanimously opted to embrace the broader and less demanding standard endorsed by most of the other courts of appeals, including this one. *See Lummi Indian Tribe*, 720 F.2d at 1125, *cited in Texas State Teachers*, 489 U.S. 784, 109 S.Ct. at 1489. Under this standard, "the plaintiff has crossed the threshold to a fee award

of some kind" if he or she "has succeeded on 'any significant issue in litigation which achieve[s] some of the benefit the parties sought in bringing suit.'" *Texas State Teachers*, 489 U.S. at 791-92, 109 S.Ct. at 1492-93 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)); *see also Lummi Indian Tribe*, 720 F.2d at 1125 (quoting same.)

The Court elaborated on its holding by stating that "at a minimum, to be considered a prevailing party within the meaning of 1988, the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Texas State Teachers*, 489 U.S. at 792, 109

S.Ct. at 1493 (citation omitted). The Court added, however, that in some instances even this admittedly low standard might not be met because of the truly insignificant nature of a plaintiff's victory: "Where the plaintiff's success on a legal claim can be characterized as purely technical or *de minimis*, a district court would be justified in concluding that even the 'generous formulation' we adopt today has not been satisfied." *Id.* (citations omitted).

C

[3] Applying the Supreme Court's generous formulation to the facts of this case, we hold that the Rombergs are indeed a "prevailing party" within the meaning of section 1988. The nature of their success in the

underlying action is neither "purely technical" nor "de minimis." On the contrary, the Rombergs prevailed on a significant issue, and they prevailed on the merits before a jury. Most importantly, the Rombergs' victory fundamentally altered the legal relationship between themselves and the defendants: six Los Angeles police officers acting under color of state law were found liable of depriving the Rombergs of their Fourth Amendment rights.

On facts strikingly similar to the facts at issue here, the Second Circuit concluded that a plaintiff qualified as a "prevailing party" deserving of fees under *Texas State Teachers*. *See Ruggiero v. Krzeminski*, 928 F.2d 558, 564-65 (2d Cir. 1991).

In *Ruggiero*, a jury found that two New Haven police officers had violated the plaintiffs' Fourth Amendment rights by conducting an unlawful search of the plaintiffs' home, even though the officers had lawfully entered the home. *Id.* at 560-61. The jury awarded the plaintiffs no compensatory damages, but the district court, apparently following the Supreme Court's decision in *Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978), awarded nominal damages in the amount of one dollar. *Ruggiero*, 928 F.2d at 561. The court then honored the plaintiffs' request for attorney fees in the amount of $12,833.34.[5] *Id.* at 564. On appeal,

---

[5] Interestingly, the court compensated the Ruggieros' attorney at the same hourly rate ($175) that the district court applied here.

the Second Circuit affirmed both the judgment and the fee award, noting that "[t]he jury's determination that [the Ruggieros'] Fourth and Fourteenth Amendment rights were violated by the search conducted by the Officers assuredly is significant" and that "the jury's determination 'changes the legal relationship' between the Ruggieros and the Officers in that a violation of rights ha[s] been found." *Ruggiero*, 928 F.2d at 564. We find the Second Circuit analysis persuasive and hold that the Rombergs' eligibility to recover fees is equally clear in this case. *See id.*

The question only becomes close if one begins to confuse -- as the defendants apparently have -- the

---

See infra at 1161.

issue of liability with the issue of damages. The fact that the jury awarded the Rombergs only one dollar each in damages does nothing to vitiate the fact that the defendants were found liable on the merits of violating the Rombergs' civil rights. Despite the amount of the award, the Rombergs still prevailed on a significant legal issue, and that alone is sufficient. *See id.* The Supreme Court made this point clear in *Texas State Teachers* when it explicitly rejected the notion that the plaintiff must obtain "the primary relief sought"; the more appropriate inquiry, the Court explained, is whether the plaintiff has prevailed on "any significant issue." *See* 489 U.S. at 791, 109 S.Ct. at 1492.

Indeed, the Court's "issue-relief" distinction highlights a fundamental difference between civil rights litigation, on one hand, and general civil litigation, on the other. Victory in civil rights litigation is not always measurable in ordinary economic terms. As a plurality of the Court opined in *City of Riverside v. Rivera*:

> we reject the notion that a [successful] civil rights action for damages constitutes nothing more than a private tort suit benefiting only the individual plaintiffs whose rights were violated. Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms. *See Carey v. Piphus*, 435 U.S. 247, 266 [98 S.Ct. 1042, 1053, 55 L.Ed.2d 252] (1978). And, Congress has determined that "the public as a whole has

> an interest in the vindication of the rights conferred by the statutes enumerated in 1988, over and above the value of a civil rights remedy to a particular plaintiff[.]" *Hensley*, 461 U.S. at 444, n.4 [103 S.Ct. at 1945 n.4] (Brennan, J., concurring in part and dissenting in part). Regardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damages awards.

477 U.S. 561, 574, 106 S.Ct. 2686, 2694, 91 L.Ed.2d 466 (1986) (plurality opinion). In fact, as the *City of Riverside* plurality also explained, the socially beneficial "deterrent effect [of civil rights suits] is particularly evident in the area of individual police misconduct, where injunctive relief generally is unavailable." *Id.* at 575, 106 S.Ct.

at 2694 (plurality opinion); *see also Nephew v. City of Aurora*, 830 F.2d 1547, 1549 (10th Cir. 1987) (en banc) ("vindication [of civil rights] often can include important social benefits that are not reflected in nominal damages"), *cert. denied*, 485 U.S. 976, 108 S.Ct. 1269, 99 L.Ed.2d 481 (1988).

[4] The dispositive inquiry for section 1988 purposes, therefore, focuses upon the legal issues at stake, not upon the prayer for relief. It focuses upon the liability stage of the proceedings, not upon the damages stage. Thus, although the Rombergs obtained virtually no monetary success and although most of their allegations never reached trial, the jury's affirmative determination that the defendants violated the Rombergs'

important civil rights is enough to render the Rombergs eligible for an award of fees. *See Ruggiero*, 928 F.2d at 564 ("Simply because the jury found that the Ruggieros did not establish their claims in all respects does nothing to lessen the significance, or importance, of the Ruggieros' success.") As the Supreme Court explained in *Texas State Teachers*:

> The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute. Where such a change has occurred, the degree of the plaintiff's overall success goes to the reasonableness of a fee award, not to the availability of the award. . . . *vel non*.

489 U.S. at 792-93, 109 S.Ct. at 1492-93; *see also Robinson v. Ariyoshi*, 933 F.2d 781, 783-84 (9th Cir. 1991).

Properly focusing upon the "legal relationship" between the parties -- and not upon the degree of monetary success achieved by the Rombergs -- we hold that the Rombergs prevailed on a significant issue within the meaning of *Texas State Teachers*. In the realm of civil rights, where Congress and the courts historically have sought to encourage the vindication of society's most cherished principles for their own sake, a nominal damages award does not a nominal victory make. *See Scofield v. City of Hillsborough*, 862 F.2d 759, 766 (9th Cir. 1988) ("An award of nominal damages to [the plaintiff]. . . does not diminish [the

plaintiff's] eligibility for attorney fees when no special circumstances are shown to make the award of fees unjust."); *Bilbrey v. Brown*, 738 F.2d 1462, 1472 (9th Cir. 1984) (attorney fees may be awarded even where damages are nominal); *cf. Floyd v. Laws*, 929 F.2d 1390, 1402-03 (9th Cir. 1991) (where jury's special verdict awarded prevailing plaintiff zero damages, plaintiff was entitled to recover one dollar in nominal damages and a reasonable attorney fee).

To the extent that other courts have declined to adopt this reasoning, we decline to follow them. *See, e.g., Estate of Farrar v. Cain*, 941 F.2d 1311 (5th Cir. 1991) (denying recovery of fees after one-dollar judgment); *Denny v. Hinton*, 131 F.R.D. 659

(M.D.N.C. 1990) (characterizing one-dollar judgment as de minimis under *Texas State Teachers* and denying recovery of fees), *aff'd mem., Denny v. Elliott*, 937 F.2d 602, and *Lawrence v. Hinton*, 937 F.2d 603 (4th Cir. 1991); *Carr v. City of Florence*, 729 F.Supp. 783, 791 (N.D.Ala. 1990) (characterizing $100 judgment as de minimis under *Texas State Teachers* and denying recovery of fees), *aff'd mem.*, 934 F.2d 1264 (11th Cir. 1991). In so doing, however, we disavow no great wealth of authority. Only the Fifth Circuit has rejected the position that an award of nominal damages makes the plaintiff a "prevailing party" within the meaning of section 1988. *Farrar*, 941 F.2d at 1311. We believe *Farrar*, which rested on the assumption that

"the sole object of [the] suit [was] to recover money damages," *id.* at 1315, is distinguishable on that basis.

The other circuit court decisions upon which defendants' briefs rely are facially distinguishable. In *Crabtree v. Collins*, 900 F.2d 79, 82-83 (6th Cir. 1990), the district court dismissed the plaintiff's action on mootness grounds, and the court of appeals concluded that the plaintiff was not a prevailing party. Similarly, in *Higgs v. Bland*, 888 F.2d 443, 451 (6th Cir. 1989), the court of appeals affirmed the denial of an award of fees where the plaintiffs' only success had been to obtain a judicial "suggestion" that the defendants' should modify the

challenged practice.[2] By contrast, the underlying district court judgment in the present action is a jury verdict for the plaintiffs on the merits of their claim.

D

The ultimate infirmity in the defendants' argument stems from the fact that the real focus of their attack is not the district court's fee

---

[2] Our recent decision in *Robinson* is similar to the Sixth Circuit's decisions in *Crabtree* and *Higgs*, and as a result, is similarly unavailing to the defendants. In *Robinson*, we held that (a) in a circumstance similar to that in *Crabtree*, "[t]he victories won by plaintiffs were. . . swept away by application of the ripeness doctrine" and (b) in a circumstance similar to that in *Higgs*, "[a] mere 'concession' as to the effects of future, unfiled legal proceedings, even if made by a responsible official, does not amount to 'prevailing' in litigation in which the pleader took nothing." 933 F.2d at 783-85. Like the plaintiffs in *Crabtree* and *Higgs* (and unlike the Rombergs here), the plaintiffs in *Robinson* failed to procure a substantive judgment in their favor on any underlying issue, or otherwise achieve any success in the litigation, and therefore did not "prevail" in any significant sense.

order at all, but the jury's verdict.[2/]

In his summation, the Rombergs' attorney informed the jury that:

> Mr. and Mrs. Romberg in this case don't want any money. They want you to vindicate their rights. If you find their rights were violated, you can award what's called nominal damages in some sum like one dollar. And I think that's all they're entitled to in this case, is nominal damages.

The defendants suggest that, without this invitation, the jury might have awarded a verdict in their favor. The district court appears to have agreed. Commenting on these closing remarks by the Rombergs attorney when it entered

---

[2/] The concurring opinion incorrectly states that this issue was not raised on appeal. On the contrary, defendants' brief repeatedly suggested that the jury would have brought in a defense verdict if not for the invitation extended by the Rombergs' attorney to award nominal damages. *See* Cross-Appellees' Brief and Appellants' Opening Brief at 7, 17, 19-22.

its $29,000 fee order, the district court stated:

> While the court does not doubt counsel's overall sincerity in this part of the argument[,] his request gave the jury a clear opportunity for a Solomonic solution. In this court's view the officers involved were acting out of genuine concern for human safety during the incident[,] and if their actions were a technical violation of the Fourth Amendment[,] that was wholly unintended. It is very likely that the jury would have returned a defense verdict but for the option of the one-dollar award, which was very pointedly suggested to them.

Romberg v. Nichols, No. 83-8448 at 2 (C.D. Cal. Jan. 20, 1989).

[5] Part of a district court's function, however, is to prevent such "Solomonic solutions" by the jury. When a jury compromises its verdict, its verdict should not stand. *See* 6A

J. Moore & J. Lucas, *Moore's Federal Practice* 59.08[4], at 113 (2d ed. 1991) ("a new trial should be granted where it appears by legally competent proof or deduction that the verdict is the result of a compromise"); *National R.R. Passenger Corp. v. Koch Indus.*, 701 F.2d 108, 110 (10th Cir. 1983) ("A compromise judgment is one reached when the jury, unable to agree on liability, compromises that disagreement and enters a low award of damages. . . . [S]uspicion should be aroused if the jury awards only nominal damages."). If the district court believed that there was insufficient evidence to support the jury's conclusion that the Rombergs' Fourth Amendment rights had been violated, then it should have granted

the defendants' motion for a judgment *non obstante veredicto*. Alternatively, the court could have granted the defendants' motions for summary judgment, directed verdict, or new trial -- all of which the court denied.

This court, however, cannot reach beyond the legal question currently before it in order to review whether the district court should have granted one of those motions. The record establishes that the jury found for the Rombergs and that their verdict was entered as the judgment of the district court, and on the basis of that record, the Rombergs are a prevailing party eligible to recover fees under section 1988.

[6] Lest there be any doubt, however, we are not unsympathetic to the plight of district courts faced with situations like the one presented here. When a civil rights attorney who recognizes that his own case is not especially strong drastically reduces his initial claims and asks the jury for nominal damages, the danger that he may have done so simply to try to preserve prevailing-party status is disturbingly real. In such cases, the "generous formulation" of *Texas State Teachers* is subject to abuse. Section 1988 was not intended as an artifice by which some plaintiffs' attorneys might line their own pockets through the pursuit of questionable claims, and it is hardly meant to reward lawyers who, in the

later stages of the fight, abandon their clients' interests to pursue their own when the battle seems otherwise lost.

We also recognize that the means by which district courts may prevent such abuses are limited. For example, we have recently held that it is reversible error for a district court to inform the jury of the plaintiff's eligibility to recover fees upon prevailing, thereby precluding any use of jury instructions as a means of reducing the risk of abuse. *Brooks v. Cook*, 938 F.2d 1048, 1050-53 (9th Cir. 1991). We have also recently held that even where a jury specifically finds that the plaintiff has suffered no actual damages, a district court must award nominal damages and should

provide a reasonable attorney fee so long as the jury finds a constitutional violation. *Floyd*, 929 F.2d at 1400-03.

Nonetheless, while the risk for abuse is real and while some of our decisions may indirectly limit the means by which district courts may fight that risk, district courts are not powerless in their efforts to prevent section 1988 abuses. If the Rombergs did not deserve to prevail, then they should not have, and the verdict in their favor should have been set aside. Instead, the jury's verdict was entered as the final judgment of the court, and the court itself expressly ruled that the Rombergs are a prevailing party. The time for questioning whether the

Rombergs should have prevailed is now long past.

III

A

[7] Having determined that the Rombergs are indeed a prevailing party within the meaning of section 1988, we must next address the question raised by the Rombergs' cross-appeal: whether the district court abused its discretion in determining the amount of the fee award.

The district court's August 1990 reinstatement implicitly adopted the reasoning and conclusions of its January 1989 order. In that earlier order, the court granted the Rombergs a recovery of $29,137.50. In arriving at this figure, the court reduced the lodestar figure of $48,562.50,

representing all of the hours claimed by the Rombergs' attorney (277.5) compensated at the rate of $175 per hour, by forty percent.

[**8-10**] When setting a fee, the district court must first set the presumptive lodestar figure. *Cunningham v. County of Los Angeles*, 879 F.2d 481, 484 (9th Cir. 1988) (*Cunningham*), *cert. denied*, 493 U.S. 1035, 110 S.Ct. 757, 107 L.Ed.2d 773 (1990). This is done "by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate." *Id.* Next, in rare cases, the district court may adjust the "presumptively reasonable" lodestar figure based upon the factors listed in *Kerr v. Screen Extras Guild*, 526 F.2d 67, 69-70 (9th Cir. 1975)

(*Kerr*), *cert. denied*, 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d 195 (1976), "that have not been subsumed in the lodestar calculation." *Cunningham*, 879 F.2d at 484. When reducing the lodestar, the district court must state "which factors it is relying on and explain[] its reasoning." *Id.* at 487.

[**11,12**] As a general rule, while the courts are given "latitude to balance and weigh permissible factors, any reliance on factors that have been held to be subsumed in the lodestar determination will be considered an abuse of the trial court's discretion." *Id.* The Supreme Court has stated that "the novelty [and] complexity of the issues, the special skill and experience of counsel, the

quality of representation, and the results obtained from the litigation are presumably fully reflected in the lodestar amount, and thus cannot serve as independent bases for increasing the basic fee award." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565, 106 S.Ct. 3088, 3098, 92 L.Ed.2d 439 (1986) (Delaware Valley) (internal quotations omitted). However, in certain "exceptional cases," a district court may adjust the lodestar based upon some of these "subsumed" factors. *Cunningham*, 879 F.2d at 489 (the lodestar may be adjusted based upon the "results obtained" in "exceptional" cases). But the district court must explain why the

factor is not adequately reflected in the lodestar. *Id.*

The primary concern of the appellate courts, therefore, appears to be that the district court not consider the "subsumed" factors both when it sets the lodestar and when it examines the increasing or reducing factors. *See Delaware Valley*, 478 U.S. at 566, 106 S.Ct. at 3098; *Cunningham*, 879 F.2d at 489. Whether the district court engaged in such double counting must be our primary inquiry in determining whether a remand is necessary. *See Delaware Valley*, 478 U.S. at 566, 106 S.Ct. at 3098; *Corder v. Gates*, 947 F.2d 374, 378-79 (9th Cir. 1991) (*Corder*); *Cunningham*, 879 F.2d at 489.

Although the district court failed to follow strictly the approach outlined above, there is no evidence of double counting and the fee award appears to be justified. Contrary to the dissent's assertion, the district judge did not concede that the hours worked and rate charged were reasonable. Rather than making a separate finding that the hours worked and the rate charged were reasonable, the district court considered all twelve *Kerr* factors together. When the district judge stated that he was accepting the hours worked at "face value," he was not holding that the hours worked were reasonable in light of the novelty of the issues, the results obtained, and the other *Kerr* factors that have been held to be

subsumed in the calculation of the lodestar. *See Delaware Valley*, 478 U.S. at 565, 106 S.Ct. at 3098; *Jordan v. Multnomah County*, 815 F.2d 1258, 1262 & n. 6 (9th Cir. 1987). Rather, the district court was merely acknowledging the assertion of the number of hours spent on the case and what the attorney believed was a reasonable hourly fee. Therefore, the district court was not engaging in double counting by reducing the award by forty percent based upon novelty and difficulty of the issues, skill requisite to perform the services, and results obtained.

Nor was the district court's justification of the basis for reduction of the award insufficient. "Although the district courts must be

given much discretion to shape awards of attorney's fees, these awards must be subject to appellate review, and they must be reversed if based on clearly erroneous considerations." *Corder*, 947 F.2d at 380. In this case, however, the district court articulated "sound reasons" in support of the fee award. *See id.*

First, the district judge reduced the fee award based upon the lack of novelty of the issues. *Romberg v. Nichols*, No. CV83-8448 RG, at 2 (C.D. Cal. Jan. 20, 1989) (order awarding attorney's fees) (*Romberg*). The dissent contends that the district judge concluded that the issues were not novel merely because the Rombergs' attorney requested only nominal damages. However, the district

judge's order does not state that the request for nominal damages is the only reason that the case is not novel. This was a relatively simple and uncomplicated case. Thus, the district judge's conclusion that the case was not novel is a valid justification for reducing the fee award.

Second, the district judge found that the third *Kerr* factor, the skill requisite to perform properly the services, justified a reduction. *Id.* at 3; *see Kerr*, 526 F.2d at 70. The district judge explained that the Rombergs' attorney "should have realized that there was little or nothing to support the claims that never got to the jury." *Romberg*, No. CV83-8448 RG, at 3. The dissent

contends that the district judge was essentially reducing the award to take into account the time spent on claims that were dismissed. The dissent concludes that this was double counting because the district judge had already determined that the elements comprising the lodestar were reasonable and the hours used to calculate the lodestar did not include time spent on the dismissed claims. However, as discussed above, the district judge did not determine that the elements used to calculate the lodestar were reasonable. Therefore, the district judge was not double counting. Moreover, the dissent has missed the point: the district judge was merely examining all of the relevant facts to determine whether

the fee was reasonable in light of the skill requisite to properly perform the legal services. Thus, the district court's analysis was not based on clearly erroneous considerations.

Finally, the district judge determined that the result obtained warranted reducing the lodestar. *Id.* Clearly, the result obtained is a legitimate factor to be considered by a district judge. *See, e.g., Cunningham*, 879 F.2d at 486, 488-89. The dissent contends that the district judge reduced the award merely because the Rombergs were awarded nominal damages. However, the "vindication" obtained by the Rombergs also does not appear to have resulted in any highly significant benefit to the Rombergs or

society in general. The district court's decision, therefore, was justified.

The reducing factors relied upon by the district judge would have been permissible justifications to reduce the elements used to arrive at the lodestar figure. *See Delaware Valley*, 478 U.S. at 565-66, 106 S.Ct. at 3098-99. *Cunningham*, 879 F.2d at 484-86. The district court merely chose to reduce the lodestar itself rather than the individual figures used to calculate it. This is an unusual case where it is clear that there has been no double counting and a consideration of the factors indicates that the fee awaRd was clearly warranted. As we have stated before:

> Mathematically, it is inconsequential whether the

> lodestar figure itself is adjusted for lack of success or whether the reasonable hours component of the lodestar is adjusted for lack of success. What matters is that the district court did not "count" for lack of success twice. We therefore hold that the district court's reduction of the lodestar, if warranted, constitutes a "harmless error."

Cabrales v. County of Los Angeles, 864 F.2d 1454, 1465 (9th Cir. 1988), *vacated on other grounds*, 490 U.S. 1087, 109 S.Ct. 2425, 104 L.Ed.2d 982 (1989), *reinstated*, 886 F.2d 235 (9th Cir. 1989), *cert. denied*, 494 U.S. 1091, 110 S.Ct. 1838, 108 L.Ed.2d 966 (1990). Therefore, although the district court did not follow the correct methodology, we believe that under the facts of this case, "any error was harmless." *Corder*, 947 F.2d at 378.

[13] Based on this analysis, how should we review the action of the district court? Clearly it is whether the district court abused its discretion. *Id.* at 377. In making this assessment, we are to be guided by three principles:

> First, discretionary judgments of the district courts, which watch civil rights cases unfold before them, must be respected. Second, the discretion of the district courts must not be unduly limited by mechanistic rules. Third, fee awards must ensure that civil rights lawyers receive *reasonable* compensation for their services. This third principle limits the district court's discretion, for this third principle underlies the requirement that the district courts carefully calculate hours and rates and fully articulate their reasoning.

*Id.*at 378 (emphasis in original; footnote omitted). Based upon these

principles, we hold that there was no abuse of discretion. We must be careful not to drift into a more restricted standard of review, but should allow the district court the discretion we assert it has to settle fees.

B

As a final consideration, we must determine (a) whether all of the myriad proceedings in this litigation represent compensable legal work and (b) whether a further assessment should be ordered to compensate the Rombergs' attorney for the delay suffered in having to wait for his recovery.

1

[14] The first question is significant because, in its order of

January 20, 1989, the district court apparently did not allow the Rombergs any compensation for their defense of the initial appeal to this court or for the subsequent remand. Furthermore, because the district court's August 1990 order essentially reinstated the January 1989 order, the current fee award fails to compensate the Rombergs' attorney for any of the proceedings that have followed January 1989.

In light of our recent decision in *Cabrales v. County of Los Angeles*, 935 F.2d 1050 (9th Cir. 1991), we hold that the Rombergs are entitled to recover fees for these additional stages of the proceedings as well: "a plaintiff who is unsuccessful at a stage of litigation that was a

necessary step to her ultimate victory is entitled to attorney's fees even for the unsuccessful stage." *Id.* at 1053.[8]

2

[15] Turning to the question of compensation for delay, the law undeniably authorizes such a recovery where it is appropriate. As the Supreme Court recently explained:

> Clearly, compensation received several years after

---

[8] In holding that an attorney is entitled to recover fees for efforts expended on unsuccessful intermediate stages of litigation, *Cabrales* did not hold that an attorney is entitled to recover fees for efforts expended on all unsuccessful claims and legal theories that the attorney at one time may have raised or pursued. The notion that we embraced in *Cabrales* is that an attorney should be compensated for those efforts that reasonably may be considered to be steps along the path to ultimate victory, whether or not every individual step was itself successful. *See Cabrales*, 935 F.2d at 1053. That does not mean, however, that the court must compensate the attorney for efforts expended on extraneous and dismissed claims that did not contribute to the victory. The proper focus is upon time expended on efforts that ultimately proved successful.

> the services were rendered -- as it frequently is in complex civil rights litigation -- is not equivalent to the same dollar amount received reasonably promptly as the legal services are performed, as would normally be the case with private billings. We agree, therefore, that an appropriate adjustment for delay in payment -- whether by the application of current rather than historic hourly rates or otherwise -- is within the contemplation of [section 1988].

Missouri v. Jenkins ex rel. Agyei, 491 U.S. 274, 283-84, 109 S.Ct. 2463, 2469, 105 L.Ed.2d 229 (1989) (footnote omitted); *see also Spain v. Mountanos*, 690 F.2d 742, 747-48 (9th Cir. 1982) (awarding interest on attorney fees under 42 U.S.C. § 1988). Accordingly, the district court should account for the propriety of an interest

adjustment to compensate for the delay in recovery on remand.

IV

We affirm the district court's judgment that the Rombergs are a prevailing party within the meaning of section 1988 and *Texas State Teachers*. We also affirm the district court's calculation of the fee award for proceedings up to the January fee award order. We remand, however, for calculation of an appropriate fee award for subsequent proceedings, as well as appropriate compensation for delay.

AFFIRMED and REMANDED for further proceedings.

WALLACE, Chief Judge, concurring:

I concur in the majority opinion except I agree only with the result in part II that the Rombergs were prevailing parties entitled to a fee award under 42 U.S.C. § 1988. I write separately on this issue because I do not fully agree with the majority's reasoning.

In part II, the majority holds that the Rombergs are prevailing parties because they prevailed on a significant issue in the litigation. I agree with this conclusion.

In *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989) (*Texas State Teachers*), the Supreme Court held that "[i]f the plaintiff has succeeded on any significant issue

in litigation which achieve[d] some of the benefit the parties sought in bringing the suit, the plaintiff has crossed the threshold to a fee award of some kind." *Id.* at 791-92, 109 S.Ct. at 1492-93 (internal quotations omitted). The Court explained that "at a minimum, . . . the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Id.* at 792, 109 S.Ct. at 1493.

The Supreme Court, however, limited its holding by stating that "[w]here the plaintiff's success on a legal claim can be characterized as purely technical or *de minimis*, a district court would be justified in concluding that even the 'generous

formulating' we adopt today has not been satisfied." *Id.* Therefore, under certain conditions even a victory on a constitutional issue may be considered *de minimis*. For example, the Court stated that the Texas State Teachers Association would not have been considered a prevailing party if the Association's only success was the district court's conclusion "that the requirement that nonschool hour meetings be conducted only with prior approval from the local school principal was unconstitutionally vague." *Id.* The Court explained that this success would be considered *de minimis* because "[t]he District Court characterized this issue as of minor significance and noted that there was no evidence

that the plaintiffs were ever refused permission to use school premises during nonschool hours." *Id.* (internal quotations omitted).

Under the standards established in *Texas State Teachers*, I believe that the Rombergs were prevailing parties. The jury found that the police officers violated the Rombergs' constitutional rights and awarded the Rombergs nominal damages of one dollar each. There is an intercircuit conflict on whether a party is entitled to prevailing party status when he or she is only awarded nominal damages. *See, e.g., Estate of Farrar v. Cain*, 941 F.2d 1311, 1315-17 (5th Cir. 1991) (declining to award attorney's fees); *Ruggiero v. Krzeminski*, 928 F.2d 558, 564-65 (2d

Cir. 1991) (awarding attorney's fees). However, nothing in *Texas State Teachers* persuades me that the Rombergs should be denied prevailing party status merely because they were only awarded nominal damages. The Rombergs prevailed on a significant issue in the litigation. As pointed out by the majority, "the Rombergs' victory fundamentally altered the legal relationship between themselves and the defendants: six Los Angeles police officers acting under color of state law were found liable of depriving the Rombergs of their Fourth Amendment rights." This is hardly similar to the example of a *de minimis* victory given by the Supreme Court in *Texas State Teachers*. *See Texas State*

Teachers, 489 U.S. at 792, 109 S.Ct. at 1493.

But I believe the majority's emphasis of the "issue-relief" distinction is misleading. The key to the prevailing party inquiry is determining whether the plaintiff "succeeded on any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit." *Id.* at 791-92, 109 S.Ct. at 1492-93 (internal quotations omitted). In making this determination, we almost certainly would have considered the magnitude of the award relevant if the Rombergs were awarded five million dollars in damages. The majority's analysis appears to make the consideration of the magnitude of the award irrelevant.

I also believe that the discussion of compromise verdicts in part II D of the majority opinion is unnecessary to the decision in this case and misleading. The only question before us is the propriety of the fee award. Nichols has not properly raised the issue of whether the verdict should be overturned as a compromise verdict. As the majority opinion recognizes, we "cannot reach beyond the legal question currently before" us and "[t]he time for questioning whether the Rombergs should have prevailed is now long past." The majority's discussion is completely unnecessary and should be considered as mere dicta.

O'SCANNLAIN, Circuit Judge, dissenting in part:

I dissent only from Part III-A of the court's opinion which affirms the forty percent reduction of the fee award. In my view, the reasons cited by the district court were insufficient to justify departure from the presumptively reasonable lodestar figure.

I

In calculating the fee award, the district court first set a lodestar figure of $48,562.50, representing all of the hours claimed by the Rombergs' attorney (277.5) compensated at the rate of $175 per hour. In so doing, the court expressly "accepted at face value" the hours submitted by the Rombergs' attorney and expressly

selected the $175 rate. *Romberg v. Nichols*, No. 83-8448 at 2, 3 (C.D. Cal. Jan. 20, 1989). The court then specifically addressed all twelve of the factors identified by the *Kerr* court as relevant to any departure from the lodestar.[1] *See Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975) (adopting twelve factors identified by the Fifth Circuit as appropriate for this purpose in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974)), *cert. denied*, 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d 195 (1976); *see*

---

[1] The majority interprets the district court's order as considering the *Kerr* factors simultaneously with setting the lodestar. Although I disagree with this interpretation, it is immaterial to the result. Whatever the order in which the award amount was calculated, the reducing factors relied on were impermissible in light of the district court's concession that the hours claimed and fee set were reasonable.

also Hensley, 461 U.S. at 429-30, 103 S.Ct. at 1937-38 (nothing that the Senate and House Reports on section 1988 both favorably cited the twelve *Johnson* factors).

The court determined that three of the factors justified a reduction of the fee: (a) the novelty and difficulty of the questions involved, (b) the skill requisite to perform the legal services properly, and (c) the amount involved and the results obtained. *See Kerr*, 526 F.2d at 70 (the second, third, and eighth factors). The Rombergs now contend that the district court abused its discretion in using these three factors to reduce the lodestar by forty percent. I agree.

In *Jordan v. Multnomah County*, 815 F.2d 1258 (9th Cir. 1987), we acknowledged that "[a] 'strong presumption' exists that the lodestar figure represents a 'reasonable' fee." *Id.* at 1262 (quoting *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565, 106 S.Ct. 3088, 3098, 92 L.Ed.2d 439 (1986)). Although the district court has broad discretion to determine the amount of a fee award, it must justify any departure from the lodestar figure if the hours and rate that determine the lodestar are themselves reasonable. *See Delaware Valley Citizens' Council*, 478 U.S. at 564-65, 106 S.Ct. at 3097-98; *Blum v. Stenson*, 465 U.S. 886, 897, 104 S.Ct. 1541, 1548, 79 L.Ed.2d 891 (1984); *see also*

Long v. IRS, 932 F.2d 1309, 1313-14 & n. 4 (9th Cir. 1991) (per curiam). This justification must include more than a bare statement of the *Kerr* factors relied on; the district court must also supply an explanation of the application of those factors to the case. *See Cunningham v. County of Los Angeles*, 879 F.2d 481, 488 (9th Cir. 1988). Here, in light of the district court's own admission of the reasonableness of both the hours claimed and the rate to be applied, I conclude that the court's purported justifications are inadequate to support its forty-percent downward departure.

A

In discussing the second *Kerr* factor, the district court explained:

> 2. The case was not novel. It did take skill under the circumstances, but the above observation about the jury's option [to produce a Solomonic solution by awarding nominal damages] is a reducing factor.

Romberg v. Nichols, No. 83-8448 at 2 (C.D. Cal. Jan 20, 1989). The court's analysis here is a non sequitur that appears to penalize the Rombergs for having prevailed in the first place. The court first states that "[t]he case was not novel" and then concludes that because the Rombergs' attorney invited nominal damages, that invitation constitutes a reducing factor. An attorney's request for nominal damages at the end of a trial, however, says nothing about the "novelty and difficulty of the questions involved"; there is no logical connection here. More

importantly, reducing the fee award on the basis of a belief that the jury would have found for the defendants if not presented with the option of awarding nominal damages is clearly impermissible. As we explained *ante*, at Part II-D of the court's opinion, if a district court concludes that the evidence does not support the jury's verdict, the appropriate course of action is to set aside the verdict -- not to penalize the prevailing attorney.

B

With respect to the third *Kerr* factor -- "the skill requisite to perform the legal services properly" -- the district court explained:

> 3. Mr. Yagman is a skilled and effective civil rights lawyer. As such, however, he should have realized that

> there was little or nothing to support the claims that never got to the jury -- again, a significant reducing factor.

Romberg v. Nichols, No. 83-8448 at 3 (C.D. Cal. Jan. 20, 1989). The Rombergs maintain that this reduction is also impermissible because none of the 277.5 hours billed was spent on claims that did not proceed to trial. This argument is equally meritorious. If the lodestar does not include the hours spent on dismissed claims, then any subsequent reduction for those hours constitutes double discounting. In any event, the proper stage at which to reduce a fee award for time that is not compensable is during the calculation of the lodestar. Here, the court expressly found that the elements comprising the lodestar were

reasonable. A subsequent discount by an undefined percentage on the basis of alleged overbilling is inconsistent with that determination and cannot suffice to rebut the presumption of correctness acknowledged by this court in *Jordan*.

C

Finally, in applying the eighth *Kerr* factor -- "the amount involved and the results obtained" -- the district court concluded:

> 8. The results obtained were (i) $2.00 in cash and (ii) "vindication." If all plaintiffs wanted was vindication they could have made the case a straight-forward Fourth Amendment claim from the outset. This is clearly a reducing factor.

Romberg v. Nichols, No. 83-8448 at 3 (C.D. Cal. Jan. 20, 1989). The Supreme Court, however, has expressly

"reject[ed] the proposition that fee awards under 1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers." *City of Riverside*, 477 U.S. at 574, 106 S.Ct. at 2694 (plurality opinion); *see also id.*at 585, 106 S.Ct. at 2699 (Powell, J., concurring in judgment and similarly rejecting a proportionality rule). This court has gone even one step further, recognizing that although the size of an award can be a permissible consideration, the smallness of an award alone cannot justify reduction of the attorney's fee. *See Jordan*, 815 F.2d at 1262 & n. 6 (citing *Hensley* and noting that the second, third, eighth and ninth factors identified in *Johnson v. Kerr*

"cannot serve as independent bases for adjusting fee awards"); *see also Long*, 932 F.2d at 1314 & n. 4 (explaining same). The substance of the prevailing claim, rather than the amount of relief received, is the central concern for section 1988 purposes. *See Greater Los Angeles Council on Deafness v. Community Television*, 813 F.2d 217, 222 (9th Cir. 1987). Indeed, as the Supreme Court recently explained, "[t]he intention of Congress [in enacting section 1988] was to encourage successful civil rights litigation, not to create a special incentive to prove damages . . . " *Blanchard v. Bergeron*, 489 U.S. 87, 95, 109 S.Ct. 939, 945, 103 L.Ed.2d 67 (1989). What the attorney has earned is a wholly

independent consideration from what the jury believes his clients have suffered.

II

In light of these considerations, I would reverse the district court's fee determination, and remand for recalculation in a manner consistent with the foregoing analysis of the law of this circuit.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL ROMBERG, et al. Plaintiffs, v. ROBERT NICHOLS, et al, Defendants.	No. CV 83 8448 RG (Mcx) ORDER

The Court of Appeals' mandate of May 25, 1990,[1/] required this Court to determine whether plaintiffs were prevailing parties under Section 1988 in light of Texas State Teachers Assn. v. Garland, etc., 109 S. Ct. 1486 (1989).

[1/] The mandate did not reach this Court until after the 60-day period within which action was required. The Ninth Circuit Order is file-stamped by the clerk of this Court August 3, 1990.

The following observations are pertinent:

1. The distinction between "central" and "significant" issue is not terribly relevant here. Only two issues were presented. They were both central and significant. These were put to the jury in a special verdict as follows:

> "Issue No. 1: Did any police officer defendant without probable cause or without exigent circumstances unlawfully enter or search plaintiffs' apartment?"
>
> "Issue No. 3: Did any police officer defendants act maliciously, oppressively, or in bad faith with regard to the entry and search?"

The first inquiry was answered in the affirmative, the second in the negative. It must be said, therefore, that plaintiffs prevailed on a "significant" issue. While the monetary award for doing so was insignificant or de minimis, the Court must conclude that the legal relationships between the adversaries were altered in the sense of a jury declaration that the defendant officers violated the plaintiffs' IV Amendment rights. Under that analysis the Court finds plaintiffs to be prevailing parties under Section 1988, thereby crossing the threshold to fee entitlement.

If there is a defect in the fee award in this case it is that the amount is grossly disproportionate to

the tangible result and that this was invited by counsel in final argument: "... Mr. and Mrs. Romberg in this case don't want any money." This Court attempted to reconcile this by its first fee order for $5,000, which was vacated by the Ninth Circuit order of August 16, 1988 and is the law of the case. If the Court of Appeals thinks that a straight-out request for nominal damages only, in a case where no experienced attorney would expect that an award of punitive damages would (i) be awarded or (ii) permitted to survive, is so cynical as to call for departure from established rules relative to Section 1988 awards, it

ought to say so. This Court is not permitted to do so.

/s/
RICHARD A. GADBOIS, JR.
United States District Judge

DATED: August 17, 1990

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL ROMBERG; DEBRA ROMBERG,	Nos.89-55202, 89-55218
Plaintiffs-Appellees, Cross-Appellants,	DC No. CV-83-8448 RG
v.	
ROBERT NICHOLS; DENNIS LAZZARI; HUGH LLOYD; JOHNNY JURTADO; THOMAS LAING; DIANE HANNON; R.D. CAMPBELL,	ORDER
Defendants, Appellants, Cross-Appellees.	

Appeal from the United States District Court for the Central District of California

Richard A. Gadbois, Jr., District Judge, Presiding

Argued and Submitted May 7, 1990 Pasadena, California

Before: WALLACE, THOMPSON, and O'SCANNLAIN, Circuit Judges

The district court's order granting attorney's fees in this case is vacated and the case remanded to the district court.

Within sixty days of the date of this order, and the district court shall determine whether plaintiffs are entitled to an award of attorney's fees as "prevailing party" under 42 U.S.C. § 1988 in light of Texas State Teachers Association v. Garland Independent School District, 109 S. Ct. 1486, 1493 (1989) (stating that "a district court would be justified" in determining that a plaintiff was not a prevailing party "[w]here the plaintiff's success on a legal claim can be characterized as purely technical or de minimis").

A copy of such order shall be

filed with the clerk of this court.

Any future appeals will be referred to this panel and will be handled on an expedited basis.

VACATED AND REMANDED.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL ROMBERG, et al.	)	No CV 83-8448 RG
Plaintiffs,	)	
v.	)	ORDER
ROBERT NICHOLS, et al,	)	
Defendants.	)	

This court's award of attorneys fees to plaintiffs' counsel was reversed by the Court of Appeals on August 16, 1988. This order resets the fees in accordance with that mandate.

This was a § 1983 civil rights action. The case that went to the jury had been considerably pared down prior to deliberation. The public

entity defendant was dismissed before trial. The court removed from the case the excessive force, conspiracy, malicious prosecution and false arrest claims. The case was expeditiously tried. At argument plaintiffs' counsel did not ask for money, other than a perfunctory request for punitive damages. He stated: "And Mr. and Mrs. Romberg in this case don't want any money. They want you to vindicate their rights. If you find their rights were violated, you can award them what's called nominal damages in some sum like one dollar. And I think that's all they're entitled to in this case, is nominal damages." (R. Tr. p. 22)

While the court does not doubt counsel's overall sincerity in this

part of the argument his request gave the jury a clear opportunity for a Solomonic solution. In this court's view the officers involved were acting out of genuine concern for human safety during the incident and if their actions were a technical violation of the Fourth Amendment that was wholly unintended. It is very likely that the jury would have returned a defense verdict but for the option of the one-dollar award, which was very pointedly suggested to them.

The following is an analysis of the Kerr factors by which the court arrives at the lodestar figure:

1. The plaintiffs' counsel claims 201.5 prior to appeal. The court has no meaningful method of either verifying

that time or surgically excising time that might have not been reasonably necessary. It will accordingly be accepted at face value. The same may be said for the supplementary request for 24 hours and 51.75 hours on appeal.

2. The case was not novel. It did take skill under the circumstances, but the above observation about the jury's option is a reducing factor.

3. Mr. Yagman is a skilled and effective civil rights trial lawyer. As such, however, he should have realized that there was little or nothing to support the claims that

never got to the jury - again, a significant reducing factor.

4. Of course there was a "preclusion of employment" in the sense that a lawyer cannot work on two cases at the same precise time, but other than that metaphysical nicety this is a neutral factor.

5. The court is very familiar with customary fees in litigation of this type for lawyers of experience. The range is wide - perhaps $150-225/hr. A rate of $175, well within the range, is selected for this case. (It is recognized that a higher rate

for the same lawyer was selected in the recent past by this judge.)

6. The fee was obviously contingent and is a neutral factor here.

7. There were no time limitations.

8. The results obtained were (i) $2.00 in cash and (ii) "vindication." If all plaintiffs wanted was vindication they could have made the case a straightforward Fourth Amendment claim from the outset. This is clearly a reducing factor.

9. The experience and ability of Mr. Yagman are fully docu-

mented.

10. There was nothing "undesirable" about this case.

11 & 12. Both factors are irrelevant to this determination.

The presumptive lodestar figure is $48,562.50 (277.5 x 175). The lodestar figure selected by the court, however, is $29,137.50, which is a reduction of the presumptive figure by 40% by reason of the court's conscientious evaluation of the combination of the reducing factors noted above.

There is no reason for adjustment to the lodestar since all relevant factors are subsumed in the Kerr analysis. The figure of $29,137.50 is a reasonable fee in this case and the

same is ordered.

/s/
RICHARD A. GADBOIS, JR.
United States District Judge

DATED: 1-20-89

APPENDIX F

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL ROMBERG; DEBRA ROMBERG,	No. 87-6724
Plaintiffs-Appellees,	DC No.CV-83-8448 RG
v.	
ROBERT NICHOLS; DENNIS LAZZARI; HUGH LLOYD; JOHNNY JURTADO; THOMAS LAING; DIANE HANNON; R.D. CAMPBELL,	MEMORANDUM
Defendants, Appellants,	

Appeal from the United States District Court for the Central District of California

Richard A. Gadbois, Jr., District Judge, Presiding

Argued and Submitted August 1, 1988

Pasadena, California

Before: WALLACE, FARRIS, and WIGGINS, Circuit Judges

The issue before us is whether the district court erred in its award of $5,000.00 attorney's fees to a prevailing civil rights plaintiff pursuant to 42 U.S.C. § 1988 when a claim is made for fees of $45,000.00.

The district judge did not, in his order, set a lodestar figure, see Hensley v. Eckerhart, 461 U.S. 424, 433-34 (1982), nor identify the amount of reduction pursuant to an analysis of factors identified in Kerr v. Screen Actors Guild, Inc., 526 F.2d 67, 69-70 (9th Cir. 1975), cert. denied, 425 U.S. 951 (1976). We are, therefore, unable to review the order.

We vacate and remand for the district court to issue a new order. We express no view as to whether the fee set by the district court was

inadequate.

VACATED AND REMANDED.

Note: This disposition is not appropriate for publication and may not be cited to or by the Courts of this Circuit except as provided by Ninth Circuit Rule 36-3.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL ROMBERG, et al.	)	No. CV 83-8448 RG
Plaintiffs,	)	
v.	)	ORDER
ROBERT NICHOLS, et al,	)	
Defendants.	)	

The motions for judgment nonobstante veredicto and for new trial are denied.

The motion for attorney's fees to counsel for plaintiff is granted in the sum of $5,000. The court has some reason to question whether all the time claimed by counsel was warranted, but careful analysis of that is unnecessary. Suffice it to say:

(1) the result achieved was fairly modest in tangible terms, (ii) it did not require exceptional legal talent to do it -- (no reflection on counsel's well-documented expertise), (iii) the award is just and reasonable in light of the claims put forth and the brevity of the trial.

Counsel for plaintiff alluded to the immediate pretrial settlement posture. While there is a temptation to chastise defendants for failure to accept a pretty reasonable resolution of the case, the court cannot -- and does not -- base this order on any such consideration.

/s/

RICHARD A. GADBOIS, JR.
United States District Judge

DATED: 30 NOV 1987

FILED
SEP 9 1992
OFFICE OF THE CLERK

No. 92-402

In The

Supreme Court of the United States

October Term, 1992

ROBERT NICHOLS, *et al.*,

Petitioners,

vs.

MICHAEL ROMBERG and DEBRA ROMBERG,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

MARION R. YAGMAN
STEPHEN YAGMAN
723 Ocean Front Walk
Venice, California 90291
(310) 452-3200

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Respondents disagree with the formulation of the question presented, and contend that it is both too specific and too fact-specific, and respondents contend that the question presented should be:

Does an award of nominal damages to plaintiffs in an action brought pursuant to 42 U.S.C. 1983 (1982) preclude an award of attorneys' fees to those plaintiffs pursuant to 42 U.S.C. 1988 (1988)?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT 1

OPINION BELOW 1

JURISDICTION 1

STATUTE INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT AND FOR AFFIRMING THE JUDGMENT AND OPINION .. 2

I BECAUSE THE *FARRAR* CASE NOW BEFORE THIS COURT WILL BE DISPOSITIVE OF THE ISSUE RAISED BY THE PETITION HEREIN, FAIRNESS REQUIRES THAT RESPONDENTS BE PERMITTED TO ADDRESS THIS COURT ON THIS PETITION 3

II IT IS IMPORTANT FOR THE COURT TO CLARIFY THE SCOPE OF ITS PRIOR HOLDING IN *GARLAND* 3

III THE CONFLICT AMONG THE CIRCUITS WARRANTS CONSIDERATION BY THIS COURT OF THIS CASE 9

TABLE OF CONTENTS – Continued

Page

IV RESPONDENTS PREVAILED ON A SIGNIFICANT ISSUE IN THIS CASE, HAVE OBTAINED SOME OF THE RELIEF THEY SOUGHT, AND, THEREFORE, ARE PREVAILING PARTIES WITHIN THE MEANING OF SECTION 1988 9

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

City of Riverside v. Rivera, 477 U.S. 561 (1986) 12

Farrar v. Cain, 941 F. 2d 1311 (5th Cir. 1991) *cert. granted sub nom. Farrar v. Hobby*, ___ U.S. ___, 112 S. Ct. 1159, 117 L. Ed. 2d 407 (1992)..... 11

Farrar v. Hobby, 112 S. Ct. 1159 (1992).....2, 3, 9, 11

Floyd v. Laws, 929 F. 2d 1390 (9th Cir. 1991)..... 8

George v. City of Long Beach, 91-55082, 91-55382 (9th Cir. July 31, 1992), 1992 W.L. 179445 .....7, 8

Hewitt v. Helms, 107 S. Ct. 1672 (1987) 11

Rhodes v. Stewart, 488 U.S. 1 (1988)..... 11

Romberg v. Nichols, WL 152118 (9th Cir. 1992) 1

Semayne's Case, 5 Coke's Reports 91a, 77 English Reports 194 (King's Bench Court 1604)..... 10

Texas State Teachers v. Garland Independent School District, 489 U.S. 782, 109 S. Ct. 1486 (1989).....2, 10

Texas State Teachers' Assn. v. Garland, 489 U.S. 782 (1989) ..... *passim*

STATUTE

42 U.S.C. Section 1988 .....9, 10

ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The respondents Michael Romberg and Debra Romberg agree that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in *Romberg v. Nichols*, WL 152118, (9th Cir. 1992), on July 7, 1992, and request that this Court affirm the judgment and opinion in all respects.

OPINION BELOW

Respondents agree that the material set forth in the Opinions Below section of the Petition is accurate.

JURISDICTION

Respondents agree with the material set forth at the Jurisdiction section of the Petition.

STATUTE INVOLVED

Respondents agree with the material set forth at the Statute Involved section of the Petition.

STATEMENT OF THE CASE

Respondents, Michael Romberg and Debra Romberg, believe petitioners' Statement of the Case is inaccurate. Accordingly, respondents incorporate by reference the Court of Appeals' statement of the facts as set forth on pages A-10-A-23 of petitioners' Appendix A.

REASONS FOR GRANTING THE WRIT AND FOR AFFIRMING THE JUDGMENT AND OPINION

It is warranted for this Court to review the judgment and the opinion of the Court below for three reasons. (1) This issue now is pending before this Court in *Farrar v. Hobby*, 112 S. Ct. 1159 (1992) (No. 91-990) (certiorari granted), in which the Court below denied an award of attorneys' fees to a plaintiff who was awarded nominal damages in a Section 1983 action. It appears that the resolution of that case will be dispositive of the issue in this case, and respondents in this case in fairness should be permitted to make their arguments to this Court. (2) It is important for this Court to clarify what some contend to be a permissible interpretation of this Court's holding in *Texas State Teachers' Assn. v. Garland*, 489 U.S. 782 (1989), that a "technical or *de minimis*" victory in a civil rights case precludes an award of Section 1988 attorneys' fees: to wit, that an award of nominal damages constitutes a technical or *de minimis* victory, and therefore precludes an award of attorneys' fees. (3) There is a significant conflict among the circuit courts of appeals on the issue of whether *Garland* applies to define a technical

or *de minimis* victory as one in which nominal damages are awarded.

I

BECAUSE THE *FARRAR* CASE NOW BEFORE THIS COURT WILL BE DISPOSITIVE OF THE ISSUE RAISED BY THE PETITION HEREIN, FAIRNESS REQUIRES THAT RESPONDENTS BE PERMITTED TO ADDRESS THIS COURT ON THIS PETITION.

As set forth above, the issue presented by the Petition now is before the Court.

Petitioners' counsel herein has submitted a brief *amicus curiae* in that case, and thus has presented petitioners' arguments to this Court in that case. Respondents herein contend that fairness requires that this Court consider their arguments on this issue by considering their Response to the Petition. (A motion is filed simultaneously with this Response in which Respondents seek to have this Petition consolidated with the *Farrar* Petition, and seek leave for permission to participate in oral argument on October 7, 1992 when the *Farrar* case is heard by this Court.)

II

IT IS IMPORTANT FOR THE COURT TO CLARIFY THE SCOPE OF ITS PRIOR HOLDING IN *GARLAND*.

Some circuit courts of appeals, as noted in the Petition, as well as petitioners, contend, respondents assert erroneously, that this Court's holding in *Garland* that a technical or *de minimis* victory in a civil rights case that precludes a plaintiff from an award of attorneys' fees

includes a victory in which nominal damages were awarded. A reading of *Garland* demonstrates that it was not the intention of this Court to preclude an award of attorneys' fees *simply* because nominal damages may have been awarded, and that *Garland* cannot be read to warrant that interpretation.

The reason for this is that such an interpretation of *Garland* would necessitate the logical fallacy known as a category mistake, a phrase coined by Gilbert Ryle in his *Concept of Mind*, 1951. Nowadays, a category mistake colloquially is called "mixing apples and oranges."

The phrase "technical or *de minimis*" in *Garland* was utilized to characterize the substance of the victory achieved, and did not in any wise suggest that such a victory was to be defined in terms of damages. Thus, petitioners' use of the quantity of damages to define the substance of the respondents' victory in this case is a category mistake because petitioners seek to define the issue of liability in terms of damages. Clearly, *Garland's* definition of the substance of the result in no wise was dependent of the amount of damages awarded. *Garland's* analysis as founded upon the change in the legal relationship between the parties, based upon the fact of a finding that one party violated the constitutional right of another party.

Petitioners have seized upon a passage from *Garland*, taken it out of context, and urge it as a predicate for their baseless conclusion. The passage from *Garland*, in full, is as follows:

> The District Court characterized this issue [among many on which plaintiff prevailed] as

> "of minor significance" and noted that there was "no evidence that plaintiffs were ever refused permission to use school premises during non-school hours." . . . *If* this had been petitioners' *only* success in the litigation, we think it clear that this alone would not have rendered them "prevailing parties" within the meaning of § 1988. Where the plaintiff's success on a legal claim can be characterized as purely technical or *de minimis*, a district court would be justified in concluding that even the "generous formulation" we adopt today has not been satisfied.

109 S. Ct. at 1493 (emphases added). It is clear that what this was intended to mean and what it means, in ordinary language usage is this: in the *Garland* case, *if* plaintiffs had prevailed only on the one issue with respect to which their ox never had been gored – because they never asked for permission to use school premises – and thus had gotten what, in effect, would have been an advisory opinion as to them (or a disposition on an issue they would not have had standing to assert had it been brought as a single claim unattached to the other claims on which they prevailed), then their victory would have been technical or *de minimis*. But, that is not what happened: in *Garland*, the victory was not on a claim that was technical or *de minimis*, and therefore, the victory in *Garland* was neither technical nor *de minimis*. Petitioners seek to lift out of context the technical or *de minimis* criterion from *Garland* and to use it as a predicate for a proposition it could not have been intended to support, given the context in which the criterion is set forth in *Garland*. Respondents in this case did not prevail on an issue of the sort that plaintiffs in *Garland* did prevail, but which

was held, almost in dictum from this Court, to be subjunctively, or illustratively, to define what this Court meant by the term "technical or *de minimis*." In *Garland*, this Court concretely defined what it meant by the term "technical or *de minimis*," and its definition includes *only* the vindication of a right that was violated in general, but was not violated as to the person who sought to have its prohibition declared to be unconstitutional. In effect, this Court held that if a plaintiff whose rights have not been directly and concretely violated sues to overturn a regulation, and the regulation is declared to be unconstitutional, then the plaintiff's victory may be declared to be technical or *de minimis*.

In this case, there was a clear and unambiguous jury verdict that petitioners violated respondents' first-order Fourth Amendment right not to have their home invaded without a warrant by the government. That finding removes the issue of an award of attorneys' fees from the *Garland* definition of "technical or *de minimis*." Petitioners' attempt to bring within the *Garland* "technical or *de minimis*" definition an award of nominal damages as a factor to preclude an award of attorneys' fees.

Here, something very serious did happen to respondents: their home was invaded by petitioner deputy sheriffs and *their own* rights were violated in a significant manner. Thus, their victory is neither technical or *de minimis*, and there is a clear, unambiguous change in the legal relationship between respondents and petitioners that did not occur in *Garland*. Neither the award of nominal damages, as requested by respondents' counsel in his summation, nor the wildest extension of the words of *Garland* supports petitioners' argument that an award of

nominal damages in a civil rights case precludes respondents' entitlement to and award of attorneys' fees.

The Ninth Circuit's opinion in this case is both fully supported by the prior case law it cites and by this Court's *Garland* holding. The Ninth Circuit in an opinion not cited by petitioners, but decided over a month before petitioners filed their petition, affirmed its holding in this case. In *George v. City of Long Beach*, 91-55082, 91-55382 (9th Cir. July 31, 1992), 1992 W.L. 179445, it was held that

> The city officers entered [plaintiff's] apartment without a warrant, and without knocking [as in this case].
>
> . . .
>
> The jury ruled against [plaintiff] on all issues and found no damages by reason of the warrantless entry.
>
> George requested a jury instruction on nominal damages which was refused by the district court. In this Circuit, nominal damages must be awarded if a plaintiff proves a violation of his constitutional rights. *Floyd v. Laws*, 929 F. 2d 1390, 1401 (9th Cir. 1991); *Romberg v. Nichols*, 953 F. 2d 1152, 1161 (9th Cir. 1992) (per curiam). *Floyd* clearly held that nominal damages must be awarded "as a symbolic vindication of [the plaintiff's] constitutional right" whether or not the constitutional violation causes any actual damage. *Floyd*, 929 F. 2d at 1403. In light of the court's finding that the officer's warrantless entry of George's house violated the Fourth Amendment, George was entitled to judgment and $1 in nominal damages on his section 1983 claim.

The reason that the jury's finding against George was invalid is that the court of appeals had determined in its prior disposition of the case, 883 F. 2d 1407 (9th Cir. 1989), that the warrantless arrest "was effected unlawfully." 883 F. 2d at 1415. That holding became dispositive on the issue of the lawfulness of the seizure notwithstanding the jury's contrary finding. Thus, the district court's refusal to instruct the jury on nominal damages was erroneous, because plaintiff was entitled to nominal damages. The Ninth Circuit concluded that George "as the prevailing party on significant issues on [his] appeal, . . . entitled [him] to attorney fees for [his] appeal [and that t]he district court shall set the amount of attorney fees on remand." Thus, in *George*, the Ninth Circuit reaffirmed its two prior holdings in both *Floyd* and *Romberg* that status as "the prevailing party on significant issues" entitles a Section 1983 plaintiff to an award of attorneys' fees, and that the issue of damages does not play any part in the definition of "prevailing party on significant issues." Its holding is based on applicable law, is fully consistent with this Court's opinion in *Garland*, and any suggestion that an award of nominal damages precludes an award of attorneys' fees is unsupported.

This Court should affirm the Ninth Circuit in this case and clarify its holding in *Garland* to exclude from the definition of "technical or *de mimimis*" a consideration of damages.

III

THE CONFLICT AMONG THE CIRCUITS WARRANTS CONSIDERATION BY THIS COURT OF THIS CASE.

For the same reason this Court granted certiorari in *Farrar,* and additionally because since the Court granted certiorari several new, conflicting circuit court opinions on the issue have been filed, it is appropriate for certiorari to be granted, and the Ninth Circuit opinion in this case to be upheld.

IV

RESPONDENTS PREVAILED ON A SIGNIFICANT ISSUE IN THIS CASE, HAVE OBTAINED SOME OF THE RELIEF THEY SOUGHT, AND, THEREFORE, ARE PREVAILING PARTIES WITHIN THE MEANING OF SECTION 1988.

Petitioners' argument in essence is that, in a section 1983 action alleging constitutional violations, no matter how egregious the constitutional violation, the victory is technical or *de minimis* if a jury awards nominal damages. From petitioners' argument, it inexorably follows that such a victory never could reach the threshold level to warrant prevailing party status for eligibility for section 1988 attorneys' fees. Petitioners miss the point, that was very clearly articulated in the Ninth Circuit opinion, which stated

> In the realm of civil rights, where Congress and the Courts historically have sought to encourage the vindication of society's most cherished principles for their own sake, a nominal damages award does not a nominal victory make.

Pet. App. A at A-37.

Petitioners gloss over the warrantless search of respondents' residence, which the jury found to be without probable cause, exigent circumstances, or consent, and which was coupled with the false arrest of the respondents. By their actions petitioners attempt to give short shrift to that most cherished maxim, embodied in the Fourth Amendment, that "every man's house is his castle," and that "[o]fficers may break and enter only on notice, to execute a warrant." *Semayne's Case*, 5 Coke's Reports 91a, 77 English Reports 194 (King's Bench Court 1604).

In *Texas State Teachers v. Garland Independent School District*, 489 U.S. 782, 109 S.Ct. 1486 (1989), upon which both the district court and court of appeals relied, in deciding respondents were entitled to "prevailing party" status within the meaning of 42 U.S.C. Section 1988, and hence eligible for an award of attorney's fees, this Court held:

> If the plaintiff has succeeded on "any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit" the plaintiff has crossed the threshold to a fee award of some kind.

Id., at 1493. And as the Court of Appeals concluded:

> [T]he jury's affirmative determination that the defendants violated the Rombergs' important civil rights is enough to render the Rombergs eligible for an award.
>
> . . .
>
> Properly focusing upon the "legal relationship between the parties – and not upon the degree of monetary success achieved by the Rombergs

> – we hold that the Rombergs prevailed on a significant issue within the meaning of *Texas State Teachers*.

Pet. App. A at A-36-37.

Petitioners persist in their refusal to acknowledge that respondents prevailed on a significant legal issue, perhaps for the reason stated by the Court of Appeals, to wit:

> The question [of eligibility for attorney's fees] only becomes close if one begins to confuse – as the defendants apparently have – the issue of liability with the issue of damages. The fact that the jury awarded the Rombergs only one dollar each in damages does nothing to vitiate the fact that the defendants were found liable on the merits of violating the Rombergs' civil rights. Despite the amount of the award, the Rombergs still prevailed on a significant legal issue, and that alone is sufficient.

Pet. App. A at A-32.

Petitioners lean heavily for their argument on the *Farrar v. Cain*, 941 F. 2d 1311 (5th Cir. 1991) *cert. granted sub nom. Farrar v. Hobby*, ___ U.S. ___, 112 S. Ct. 1159, 117 L. Ed. 2d 407 (1992) (No. 91-990), but *Farrar* in turn bases its decision on *Rhodes v. Stewart*, 488 U.S. 1 (1988), and *Hewitt v. Helms*, 107 S. Ct. 1672 (1987), neither of which cases afforded the respective plaintiffs *any relief at all*. In *Hewitt* the victory was technical or *de minimis* by virtue of mootness, and in *Rhodes*, the application of the qualified immunity defense by the district court operated to bar *all* relief. As the court below stated:

> Only the Fifth Circuit has rejected the position that an award of nominal damages makes the plaintiff a "prevailing party" within the meaning of section 1988. *Farrar*, 941 F. 2d at 1311. We believe *Farrar*, which rested on the assumption that "the sole object of [the] suit [was] to recover money damages," *id.* at 1315, is distinguishable on that basis.

Pet. App. A at A-39-A-40.

Petitioners' last ditch effort to persuade this Court that iniquities will follow should this Court not heed their exhortation that an award of nominal damages in a civil rights case be deemed technical or *de minimis*, is to raise the specter of a myriad of civil rights lawsuits being filed merely in the hope of collecting attorney's fees. However, as the Court of Appeals stated:

> Part of a district court's function, however, is to prevent . . . "Solomonic solutions" by the jury. When a jury compromises its verdict, its verdict should not stand. . . . If the district court believed that there was insufficient evidence to support the jury's conclusion that the Rombergs' Fourth Amendment rights had been violated, then it should have granted the defendants' motion for a judgment *non obstante veredicto*. Alternatively, the court could have granted the defendants' motion for summary judgment, directed verdict, or new trial – all of which the court denied.

Pet. App. A at A-44-45.

In fact, as was recognized by this Court in the *City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986) (plurality), the "socially beneficial 'deterrent effect [of civil rights suits]

is particularly evident in the area of individual police misconduct, where injunctive relief is generally unavailable.' " Pet. App. A at A-34-35. As in *Garland*, 109 S. Ct. at 1494:

> [Respondents have] served the "private attorney general" role which Congress meant to promote in enacting the Civil Rights Attorney's Fees Awards Act of 1976. They prevailed on a significant issue in the litigation and have obtained some of the relief they sought and are thus "prevailing parties" within the meaning of Section 1988.

CONCLUSION

The writ of certiorari should be granted, and the Court of Appeals' disposition should be affirmed.

MARION R. YAGMAN
STEPHEN YAGMAN
723 Ocean Front Walk
Venice, California 90291
(310) 452-3200